

NOVEMBER 1984

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11-30-84	Rushton Mining Company	PENN 85-44-R	Pg. 2699



NOVEMBER

Review was granted in the following cases during the month of November:

Secretary of Labor on behalf of Robert Ribel v. Eastern Associated Coal Corporation, Docket No. WEVA 84-33-D. (Judge Koutras, September 24, 1984).

United Mine Workers of America v. Westmoreland Coal Company, Docket No. WEVA 81-256-C. (Judge Steffey, September 24, 1984).

Disciplinary Proceedings, based on Roger Hutchinson v. Ida Carbon Corp., Docket No. D 85-1 (KENT 84-120-D) (Judge Broderick, November 1, 1984).

Secretary of Labor, MSHA v. Kitt Energy Corporation, Docket No. WEVA 83-125-R. (Judge Fauver, October 4, 1984).

United Mine Workers of America v. Greenwich Collieries, Docket No. PENN 84-158-C. (Judge Koutras, October 18, 1984).

Secretary of Labor on behalf of 4 miners v. Jim Walter Resources, Docket Nos. SE 84-35-D, SE 84-45-D, SE 84-47-D, SE 84-52-D. (Judge Melick, October 15, 1984).

Lonnie Jones v. D & R Contractors, Docket No. KENT 83-257-D(A). (Judge Melick, October 18, 1984).

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket Nos. SE 84-66, SE 84-67. (Judge Kennedy, October 19, 1984)

Review was denied in the following cases during the month of November:

Secretary of Labor, MSHA v. U.S. Steel Mining Co., Docket No. SE 84-10. (Judge Koutras, October 1, 1984)

Secretary of Labor, MSHA v. Montana Contract Mining, Docket No. WEST 83-83-M. (Judge Morris, October 1, 1984)

Secretary of Labor, MSHA v. Bigelow-Liptak Corporation, Docket No. CENT 84-24-M. (Judge Moore, October 17, 1984)



COMMISSION DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

September 12, 1984

SECRETARY OF LABOR,	:	Docket Nos. BARB 79-319-PM
MINE SAFETY AND HEALTH	:	SE 79-56-M
ADMINISTRATION (MSHA)	:	SE 79-91-M
	:	SE 79-92-M
v.	:	SE 79-93-M
	:	SE 79-94-M
CAROLINA STALITE COMPANY	:	SE 79-95-M
	:	SE 79-85-M
	:	SE 79-87-M
SECRETARY OF LABOR	:	SE 79-114-M
MINE SAFETY AND HEALTH	:	SE 80-35-M
ADMINISTRATION (MSHA)	:	SE 80-37-M
	:	SE 80-44-M
v.	:	
	:	Docket Nos. SE 80-21-M
CAROLINA STALITE COMPANY	:	SE 80-61-M
	:	SE 80-73-M
	:	SE 80-79-M
	:	SE 81-6-M

ORDER

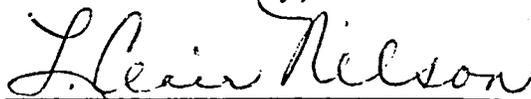
On May 15, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in Donovan v. Carolina Stalite Co., 734 F.2d 1547, reversing the Commission's decisions in Carolina Stalite Co., 4 FMSHRC 423 (March 1982) (Docket Nos. BARB 79-319-PM, etc.), and Carolina Stalite Co., 4 FMSHRC 910 (May 1982) (ALJ) (Docket Nos. SE 80-21-M, etc.), and holding that Carolina Stalite's facility is a "mine" subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The Court remanded the cases for further proceedings consistent with its opinion. The Court issued the certified copy of its judgment on August 22, 1984.

In accordance with the Court's opinion, the administrative law judge's decision in Docket Nos. BARB 79-319-PM, etc., reported at 2 FMSHRC 3508 (December 1980), assessing civil penalties totalling \$14,542.00, is reinstated as the final order of the Commission. Docket Nos. SE 80-21-M, etc. are remanded to the administrative law judge originally assigned for further proceedings including the assessment of appropriate civil penalties.

We additionally address an apparent misperception of Commission case law that is reflected in the Court's opinion. The Court stated, "The Commission construed the statute ... to require a company actually to extract a mineral before being subject to Mine Act jurisdiction." 734 F.2d at 1551. We emphasize that no such restriction was intended by our decision in this matter. See Alexander Brothers, Inc., 4 FMSHRC 541, 543-44 & nn.8 & 9 (April 1982), in which we held that a connection with the extractor was not required for a facility to be subject to the 1969 Coal Act. Such a connection is also not required for coverage under the Mine Act. 1/

  
Rosemary M. Collyer, Chairman

  
Richard V. Backley, Commissioner

  
L. Clair Nelson, Commissioner

1/ The terms of office of our former colleagues, Commissioners Frank F. Jestrab and A. E. Lawson, expired at the end of day on August 30, 1984. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves as a panel of three members to exercise "all of the powers of the Commission," including the issuance of orders and decisions in proceedings before this Commission.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

November 8, 1984

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
on behalf of GEORGE ROY LOGAN : Docket No. KENT 81-162-D  
 :  
v. :  
 :  
BRIGHT COAL COMPANY, INC. and :  
JACK COLLINS :

DECISION

This proceeding involves a discrimination complaint brought by the Secretary of Labor on behalf of George Roy Logan under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 815(c)(2). The Secretary alleges that Logan was unlawfully discharged by Bright Coal Company, Inc. ("Bright") and, individually, by his former supervisor, Jack Collins. The basic legal claim underlying the complaint is that on or about January 19, 1981, Logan engaged in safety activity protected by the Mine Act by refusing to set safety posts in an area of broken, unsupported, dangerous top, and that Logan was discharged by Collins for engaging in such activity. The administrative law judge held in favor of Bright and Collins, and dismissed the Secretary's complaint. 4 FMSHRC 1343 (July 1982)(ALJ). For the reasons that follow, we reverse and remand with instructions for further proceedings.

I.

The primary issue before us arose in the discovery phase of this litigation. Respondents Bright and Collins sought production from the Secretary of all statements given to the Secretary by Logan and others, as well as the Secretary's records relating to his investigation of the case. Respondents filed a motion to compel production of the documents on the grounds that they were essential to the preparation of respondents' defense, and that the Secretary had not shown that the information was protected from disclosure.

The Secretary maintained that all statements made by Logan had been provided to respondents during the course of Logan's deposition. The Secretary declined to produce the other requested documents asserting that they "would reveal or tend to reveal the identity of informers who may have given information to the Secretary," and that such information

was protected pursuant to the informer's privilege, the attorney work product privilege, and the executive privilege. 1/ The Secretary opposed respondents' motion to compel production, stating that the motion was unsupported, inasmuch as respondents failed to demonstrate that the documents requested were essential to preparation of their case, the existence of extraordinary circumstances requiring disclosure, or their inability to obtain elsewhere the information sought.

Respondents filed an amended motion to compel production stating that their need for the requested documents was "apparent," that the Secretary had made no showing that the documents were privileged, that certain of the documents bear upon the integrity of the investigation conducted by the Mine Safety and Health Administration ("MSHA"), and that the Secretary's fear of possible economic reprisal by the operator against miners who had given statements was moot because the operator had ceased operations. Respondents sought an order from the judge compelling the Secretary to comply with their amended request for production including, among other things, "all documents and witnesses, not expected to be introduced, which or who tend to disprove the allegations of the applicant."

Such was the procedural and legal posture of the question of privilege as it was placed before the administrative law judge. The judge noted that the provisions of Commission Rule 59, 29 C.F.R. § 2700.59, relating to disclosure of miner witnesses and informants, must be observed. 2/ The judge ruled that an "informer" is one who provides MSHA with information detrimental to an operator. According to the judge, a person who gives the Secretary information favorable to an operator is not an informer and that person's identity must be disclosed by the Secretary upon request. The judge also ruled that all statements in the Secretary's possession which tend to disprove the allegations of the discrimination complaint were to be disclosed.

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1/ It is apparent that the Secretary's underlying motive for invoking the executive and attorney work product privileges is to shield the identity of informers. Accordingly, this case is resolved straightforwardly by addressing the issue presented solely in the context of the informer's privilege. Should the Secretary determine that continued litigation of the claimed attorney work product privilege is necessary in this case, he may reassert and further support it before the administrative law judge below. The Secretary has declined to pursue on review the applicability of the executive privilege.

2/ Rule 59 provides:

Name of miner witnesses and informants.

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.

The Secretary requested the judge to reconsider his ruling. The Secretary stressed that, through the depositions that had been taken, the respondents already had been supplied with the names of all persons having knowledge of the facts. The Secretary argued that the narrow definition of "informer" adopted by the judge defeated the underlying purpose of the informer's privilege. He maintained that if he were to comply with the judge's order, the respondents, being aware of all persons having knowledge of the facts, and being provided with the identities of those persons who made statements favorable to the respondents, could thereafter readily determine the identity of those persons who had made statements detrimental to their position.

The judge rejected the Secretary's arguments. He ruled that a person making a statement to the Secretary which tended to discredit Logan, or that would show that there was no discrimination, was not an informer and that such person's identity and statements were not privileged. According to the judge, if an individual gave information favorable to the respondents, but also reported a violation of the Mine Act, MSHA was to disclose the former information in such a way as to avoid revealing the latter. If individuals who made statements favorable to the respondents were called as witnesses, the judge directed that no questions be asked of them that would tend to reveal whether they had reported violations of the law.

The Secretary declined to produce the documents in accordance with his policy of protecting confidential sources. The judge, in turn, issued an order listing a number of sanctions he would impose at the hearing should the Secretary refuse to comply with the particulars of his order. The judge also issued a subpoena duces tecum to the Secretary compelling him to bring to the hearing all documents tending to disprove the allegations of Logan, and the names of witnesses which these documents indicated would testify adversely to the Secretary's position.

Respondents filed a motion to dismiss on the ground that the Secretary had failed to comply with the judge's orders. The Secretary did not oppose dismissal. The judge, however, denied the operator's motion for dismissal noting the absence of assent by the alleged discriminatee, Logan. Shortly before the hearing, the Secretary provided the judge and counsel for respondents with a copy of his investigative file, except for those items which the Secretary deemed to be privileged, and a list of all persons whose names appeared in his file, including those believed to have knowledge of relevant facts.

## II.

The informer's privilege is the well-established right of the government to withhold from disclosure the identity of persons furnishing information of violations of the law to law enforcement officials. Roviaro v. United States, 353 U.S. 53, 59 (1957). See generally Annot., 8 ALR Fed. 6 (1971). The purpose of the privilege is to protect the public interest by maintaining a free flow of information to the government

concerning possible violations of the law and to protect persons supplying such information from retaliation. Roviaro, 353 U.S. at 59; Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 305 (5th Cir. 1972). The privilege is qualified, however, and where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 60-61. 3/

Respondents contend that the Secretary improperly attempted to limit the scope of discovery based solely upon a bare assertion of privilege without proper support by affidavit or proof of the applicability of the privilege. The burden of proving facts necessary to support the existence of the informer's privilege rests with the Secretary. Secretary of Labor v. Stephenson Enterprises Inc., 2 BNA OSHC 1080, 1082 (1974), 1973-74 CCH OSHD ¶ 18,277 at 22,401, aff'd, 578 F.2d 1021 (5th Cir. 1978). In the instant case, counsel for the Secretary asserted the privilege and resisted attempts by the respondents to obtain the disputed material. There is authority for the proposition that the privilege can be invoked only through the filing of a formal claim of privilege and confidentiality by the head of the department with control over the matter, supported by affidavits attesting to facts sufficient to allow an independent judicial determination that the privilege exists. Fowler v. Wirtz, 34 F.R.D. 20 (S.D. Fla. 1963); Cf. Black v. Sheraton Corp. of America, 564 F.2d 531, 543 (D.C. Cir. 1977). The great weight of case law concerning the privilege, however, addresses and disposes of the issue without focusing on whether the privilege was "formally" raised. Here the claim of privilege was raised by the Secretary's trial attorney in response to the respondents' motions and the judge's orders. While the Secretary's claim of privilege may not have been raised in as formal and complete a fashion as possible, it was raised with sufficient formality to alert the judge and the opposing parties to the possibility of harm that could occur from disclosure of the statements. We therefore hold that the Secretary's method of raising the privilege was sufficient. We proceed with analysis of the general issue.

3/ Before the question of privilege is reached, it must be determined whether the information sought through discovery is relevant to the subject matter of the proceeding. Wirtz v. Continental Finance and Loan Co., 326 F.2d 561, 563 (5th Cir. 1964). The scope of discovery in Commission proceedings is governed by Commission Procedural Rule 55(c), which provides:

Parties may obtain discovery of any relevant matter, not privileged, that is admissible evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

29 C.F.R. § 2700.55(c). No one has disputed the relevancy of the information contained in the statements sought by respondents. Certainly, the judge appears to have considered the material to be relevant. Given the absence of objection, the judge's rulings, and the broad interpretation traditionally accorded rules governing discovery, we assume that the material subject to the judge's orders is relevant, and proceed to consider whether the informer's privilege applies.

Although it is not absolutely clear from the record whether the Secretary is actually asserting the informer's privilege on behalf of non-miners as well as miners, the public interest in protecting persons who discuss alleged Mine Act violations with government officials is served regardless of the relationship of the informer to the alleged violator, i.e., whether the informer is an employee of the respondent or a non-employee. Courts have long recognized the obligation of all citizens to cooperate in law enforcement efforts and have encouraged and protected the communication of possible violations of law by shielding the informer's identity. Roviaro, 353 U.S. at 59. In addition, it has been held that the informer's privilege is applicable to any person furnishing information to government officials concerning violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. Secretary of Labor v. Quality Stamping Products Co., 7 BNA OSHC 1285, 1288 (1979), 1979 CCH OSHD ¶ 23,520 at 28,504 (OSHRC). We believe that a similar conclusion is appropriate under the Mine Act.

The Mine Act and its legislative history reflect congressional concern about the possibility of retaliation against miners who participate in enforcement of the Act. Section 103(g)(1) provides miners with the right to obtain an immediate inspection of the mine upon the miner's notification to the Secretary of the existence of a violation or danger. 30 U.S.C. § 813(g)(1). This section further provides that "the name of the person giving said notice and the names of individual miners referred to therein shall not" be provided to the operator. See S. Rep. No. 181, 95th Cong., 1st Sess. 29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978) ("Legis. Hist."). Similarly, section 105(c)(1) of the Act proscribes discrimination where, among other things, a miner has instituted or caused to be instituted any proceeding under or related to the Act, or has testified or is about to testify in any such proceeding. 30 U.S.C. § 815(c)(1); Legis. Hist. at 623. We believe that these expressions of congressional concern for protecting the identity of miners who contact the Secretary regarding violations of the Act, and otherwise protecting miners who participate in enforcement of the Act, underscore the need for the recognition and proper application of the informer's privilege in Mine Act proceedings. Therefore, in order to maximize the lines of communication with the Secretary concerning violations of the Mine Act, we hold that a person's status as an informer is not dependent on whether that person is an employee of a mine operator. The presence of an employment relationship, however, with the greater opportunity for retaliation that it provides, is a relevant factor to be considered in conducting the balancing test, discussed infra, for determining whether the privilege must yield in a particular case.

The crucial issue in the present case remains whether the substance of the information furnished to the Secretary by an individual is determinative of that person's status as an informer. Respondents contend that the administrative law judge properly ruled that persons who furnish the Secretary with information favorable to the operator are not informers. The Secretary maintains that an informer is entitled to anonymity, regardless of the substance of the information he furnishes.

We hold that the applicability of the informer's privilege to the Mine Act does not rise or fall based upon the substance of a person's communication with government officials concerning a violation of law. To hold otherwise would undermine the very purpose of that privilege. The informer's privilege is recognized at law in order to encourage all citizens to cooperate with government officials who are investigating possible violations of our nation's laws. To ensure that this public interest is fully served, it is essential that citizens who communicate with government officials in such investigations can be confident that their cooperation will not affect them adversely. This confidence would be seriously eroded, and the citizenry's desire to cooperate by communicating with government officials chilled, if the substance of a communication were held to control the disclosure or non-disclosure of the identity of the person giving the statement.

The practical reasons underlying this conclusion are manifest. Not only could disclosure of the identities of persons giving favorable statements to MSHA lead, by process of deduction, to the identification of those persons giving adverse statements, but persons identified as giving favorable statements would be vulnerable to direct or subtle pressure to give even more favorable testimony. Cf. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 240 (1978). Furthermore, even though statements favorable to a party would not be resented by that party, other interested persons or parties might not hold as charitable a view of the "favorable" statements. Id. Finally, a disclosure test that turns on the "favorable" or "unfavorable" nature of the contents of a statement would place on the government an obligation difficult to discharge due to the inherent subjectivity of the judgment required.

Therefore, we hold that the judge erred in ruling that the informer's privilege applies only to persons furnishing information detrimental to a party. Rather, an "informer" is a person who has furnished information to a government official relating to or assisting in the government's investigation of a possible violation of law, including a possible violation of the Mine Act. Because the judge applied an erroneous test in ruling that the Secretary was required to disclose information and thereafter imposed sanctions against the Secretary for his failure to make that disclosure, a remand to the judge for application of the proper test is necessary.

Given the procedural posture of this case, on remand the judge should order the Secretary to turn over the balance of the material withheld for an in camera inspection. In evaluating this material, the judge should first determine whether the information sought by the respondents is relevant and, therefore, discoverable. If he concludes that the material is discoverable, he should then determine whether the information is privileged. Application of the informer's privilege should be based upon the definition of "informer" adopted above.

Recognizing that the informer's privilege is qualified, if the judge concludes that the privilege is applicable, he should next conduct a balancing test to determine whether the respondents' need for the information is greater than the Secretary's need to maintain the privilege to protect the public interest. Drawing the proper balance concerning the need for disclosure will depend upon the particular circumstances of this case, taking into account the violation charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Among the relevant factors to be considered are the possibility for retaliation or harassment, and whether the information is available from sources other than the government.

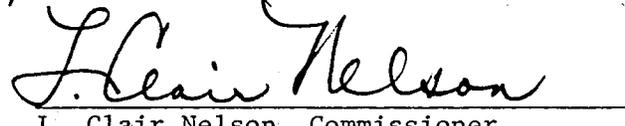
The burden of proving facts necessary to show that the information is essential to a fair determination rests with the party seeking disclosure. Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d at 307. In this regard a demonstrated, specific need for material may prevail over a generalized assertion of privilege. Black v. Sheraton Corp. of America, 564 F.2d at 545. Some of the factors bearing upon the issue of need include whether the Secretary is in sole control of the requested material or whether the material which respondents seek is already within their control, and whether respondents had other avenues available from which to obtain the substantial equivalent of the requested material. Where the disclosure of the identity of an informer is essential to a fair determination of the case, the privilege must yield or the case may be dismissed. Roviaro, 353 U.S. at 59.

If, on the one hand, the judge concludes that the Secretary's need to preserve the identity of his informers should prevail, he should deny the amended motion to compel production of documents, seal the material previously withheld as part of the record for use on any appeal, and proceed to decide the case on the merits without resort to the sanctions previously imposed due to the Secretary's nondisclosure of the statements. If, on the other hand, the judge concludes that the respondents' need for this information is essential for a fair determination of the case, and that the privilege must yield, he should order the Secretary to disclose the information. The judge may, at his discretion, conduct a limited hearing to afford the parties an opportunity to develop additional evidence based upon the disclosure. He should then proceed to decide the case solely on the basis of the supplemented record. Should the Secretary resist the judge's order to disclose, dismissal of the proceeding is the appropriate sanction with further review available in accordance with section 113(d)(2) of the Mine Act. 30 U.S.C. § 823(d)(2). In any event, the judge's decision must be supported by findings of fact and conclusions of law, and be grounded in the body of case law developed by the Commission in the areas of work refusal and discriminatory discharge.

For the reasons set forth above, we reverse the decision of the administrative law judge and remand the case to him for further proceedings consistent with this decision.

  
Richard V. Backley, Acting Chairman

  
James A. Lastowka, Commissioner

  
L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

NOV 9 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 83-171  
Petitioner : A/O No. 15-02290-03508  
v. :  
: Docket No. KENT 83-240  
INCOAL, INCORPORATED, : A.C. No. 15-02290-03512  
Respondent :  
: No. 11 Mine

CORRECTION TO DECISION APPROVING SETTLEMENT

Before: Judge Broderick

A decision approving settlement was issued in the above cases on October 31, 1984. The wording of the decision should be corrected as follows:

Page 2, paragraph 7, the first sentence should read as follows:

Thus, the nine violations were originally assessed at a total amount of \$64,000.

*James A. Broderick*

James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

NOV 2 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 83-73  
Petitioner : A.C. No. 02-00533-03503  
: :  
v. : Black Mesa Mine  
: :  
PEABODY COAL COMPANY, :  
Respondent :

DECISION

Appearances: Marshall P. Salzman, Esq., Office of the Solicitor,  
U.S. Department of Labor, San Francisco,  
California,  
for Petitioner;  
Michael O. McKown, Esq., Peabody Coal Company,  
St. Louis, Missouri,  
for Respondent.

Before: Judge Morris

This case, heard under provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of the Black Mesa surface coal mine operated by Peabody Coal Company. The Secretary of Labor seeks civil penalties because respondent allegedly violated two safety regulations adopted under the authority of the Act.

Procedural History

After notice to the parties, an expedited hearing was held in Phoenix, Arizona on December 13, 1983. The parties filed post-trial briefs and on March 6, 1984 the judge's decision was issued. On March 26, 1984 the judge received a motion for a rehearing filed by Peabody. The parties were advised by the judge that his jurisdiction had terminated. The motion was, accordingly, forwarded to the Commission.

On April 4, 1984 the Commission directed the judge to consider and rule on the operator's motion and to take such further action as might be necessary or appropriate (Order, April 4, 1984).

On April 10, 1984 the judge granted the parties an opportunity to state their views concerning Peabody's motion. The judge further indicated that if the motion was granted he would take official notice of the trial transcript in El Paso Rock Quarries, Inc., 3 FMSHRC 35 (1981).

After considering the response of the parties the judge granted Peabody's motion (Order, April 25, 1984).

On September 11, 1984 a supplemental hearing was held in Denver, Colorado. The parties waived their right to file further briefs and they rested on their oral arguments.

#### Citation 2006837

In connection with this citation the Secretary of Labor seeks a civil penalty of \$2,000 because Peabody failed to provide a berm on its elevated roadway, thereby violating the mandatory standard published at 30 C.F.R. § 77.1605(k), which provides:

(k) Berms or guards shall be provided on the outer bank of elevated roadways.

#### Issues

The issues are whether berms are to be provided at the edge of a bench in the working pit of a multiple seam surface coal mine. Further, a secondary issue is whether the diminution of safety doctrine is viable.

#### Summary of the Evidence at the hearing in December, 1983

The facts surrounding the death of dozer operator Cecil Yazzie are basically uncontroverted.

Petitioner's evidence, in the main, addresses the details of the accident. Peabody's evidence generally addresses the operation of its surface coal mine. A sketch, Exhibit P1, illustrates the location of the highwall, the coal seam, the path of Yazzie's dozer, the keyway and the spoil pile.

William G. Denning testified for MSHA: In November 1982 MSHA Inspector Denning investigated a fatal accident that occurred in the J1-N6 (hereafter J-1) pit at Peabody's Black Mesa coal mine (Tr. 7, 10, 11; Exhibit P1). His investigation established that on November 5, 1982, at the commencement of the shift, at 4 p.m., dozer operator Cecil Yazzie met his supervisor, Moreo, in the pit area. Moreo drove Yazzie through the pit from the coal face on the Blue seam coal bench to Ramp C. Moreo instructed Yazzie in his work. His duties included leveling the shot coal from the previous shifts, making ramps up the coal face, and building portions of Ramp C (Exhibit P1).

After leveling the shot coal Yazzie proceeded to Ramp C and began working at that location. At about 11:30 p.m. Yazzie, Moreo and Ralph Charlie (shooter/blaster) were located near the bottom of Ramp C. They were preparing to set off a coal shot on the Blue coal seam. Yazzie's dozer, parked on the ramp, was used as protection from the blast. After a delay the shot was set off. Moreo found no misfires and he left the coal bench. While he was leaving the pit Moreo passed Yazzie who was starting to tram his dozer from Ramp C through the pit to the carry-all bus at Ramp E. Moreo continued out of the pit and stopped for a few minutes to talk to the coal loader operators. He then proceeded to Ramp E. After arriving at Ramp E, Moreo became concerned because he could not find Yazzie. Moreo then drove to the coal face on the Blue seam and, after a brief inspection, he observed Yazzie's upset dozer in the keyway near Ramp C. (Tr. 13; Exhibit P1). Moreo, who was also an Emergency Medical Technician, and others could not revive the unconscious Yazzie (Exhibit P1).

The keyway, or ditch, was an area excavated by the dragline along the seam coal bench. It was 31 feet to the bottom of the keyway. At the time of the accident the keyway extended from Ramp C approximately 600 feet toward Ramp E.

The inspector's investigation further established that, after leaving Ramp C, Yazzie's dozer traveled in a path at a slight angle away from the keyway. After traveling approximately 75 feet Yazzie changed directions and went toward the keyway. He made another slight correction when 40 feet from it but he continued in the general direction of the keyway. After the second change in direction he traveled approximately 35 feet before toppling off the coal bench into the keyway. At that point his dozer was at the edge of the coal shot (Exhibit P1).

The dozer tread marks for the final 35 feet indicate the dozer was still tramping forward at the time of the accident. It appeared that the outer edge of the coal bench collapsed under the dozer, causing it to roll sideways off of the bench (Exhibit P1).

The dozer fell about 31 feet, impacting the top edge of the rollover protective structure. Yazzie remained inside the operator's cab; however, it appeared he was not wearing the seat belt that was provided (Exhibit P1).

After the coal shot and before this accident occurred the dragline had resumed operations. While digging, the dragline's lights illuminated the pit and accident area; however, as the

dragline spoiled, it swung away from the pit, leaving the area relatively dark. This change from light to dark could have affected Yazzie's perception. Also while spoiling, the dragline created dust in the pit that could have affected visibility (Exhibit P1).

Yazzie was normally assigned to work at the J-7 pit area. He worked in this particular pit, J-1, only when needed. A keyway, as excavated in the J-1 pit, is sometimes, but not always, present in the J-7 pit. The unexplained changes in the direction of the dozer could have been made by Yazzie in order to tram the dozer around the shot coal. Since Yazzie was newly assigned to the J-1 pit he may have forgotten about the keyway being adjacent to the shot coal and trammed the dozer into it (Exhibit P1).

As a result of its investigation MSHA concluded that the accident occurred due to the fact that Yazzie turned the dozer and trammed it toward the keyway. Since there was no berm along the outer edge of the elevated coal bench there was nothing to prevent the dozer from traveling into the keyway. MSHA could not determine the reason why Yazzie turned the dozer toward the keyway. In MSHA's opinion a contributing factor to the fatality was Yazzie's failure to wear the seat belt provided in the dozer (Exhibit P1).

MSHA's inspection manual contains guidelines construing the berm standard. The manual states:

The requirements of Section 77.1605(k) apply to that part of an elevated haulage road where one bank is, or both banks are, unprotected by a natural barrier which will prevent vehicles or equipment from running off and rolling down the unprotected bank or banks.

"Elevated roadways", as used in this requirement, are roadways of sufficient height above the adjacent terrain to create a hazard in the event mobile equipment ran (sic) off the roadway.

"Berm" as used in this requirement means a pile or mound of material at least axle high to the largest piece of equipment using such roadway, and as wide at the base as the normal angle of repose provides. Where guard rails are used in lieu of berms, they shall be of substantial construction.

The width of the haulage road does not preclude the need for berms or guard rails.

(Exhibit P8).

In December 1981, in response to questions concerning the berm standard, the administrator for coal mine safety and health issued MSHA's policy memorandum 81-40C. The administrator, on behalf of MSHA, stated in part as follows:

Section 77.1605(k), 30 CFR 77, is applicable to all elevated roadways on mine property, including roads used to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways. Berms or guards are required on all exposed banks of elevated roadways. Thus, elevated roadways with two exposed banks are required to have berms or guards on both sides.

(Exhibit P7).

At the time of the accident the dragline had exposed the Blue coal seam. Two ramps were being used for access to the pit area (Tr. 12, 13; Exhibit P1).

In the inspector's opinion a berm should have been placed from the point where Ramp C intersected the Blue coal seam bench back towards Ramp E, a distance of about 600 feet (Tr. 22). The inspector considered the coal bench a roadway because the same type of equipment uses the coal bench and the haul roads (Tr. 23).

Surface changes occur in the mine as mining progresses from one seam to another but there is always a bench in the coal pit used for a travelway (Tr. 23).

The MSHA surface inspection manual (Exhibit P8 at pages 336, 337) and the MSHA policy memorandum define an elevated roadway. These definitions, in the inspector's opinion, are applicable to Peabody's work place (Tr. 24-26, 61). The inspector relied on the policy memorandum in forming an interpretation of what constitutes a roadway (Tr. 43). A roadway is a travelway used to transport equipment, personnel and coal (Tr. 43, 44, 61). But the inspector would not consider a surge pile to be a roadway (Tr. 49, 50).

In the inspector's opinion there are some "gray areas" as to what constitutes a roadway; in addition, an inspector has a degree of judgment as to the citations he can issue (Tr. 50, 51).

The lack of a berm, as here, presented a hazard to a miner such as Yazzie (Tr. 26). A berm can either stop a vehicle, redirect it, or warn an operator that he is in close proximity to the edge (Tr. 27, 39, 40).

In the inspector's opinion a berm would not be necessary if the dozer was cleaning the coal or pushing dirt off the edge of the bench (Tr. 50).

### Respondent's Evidence

Buck Woodward, Tracy Northington, Alan Cook, Don Holt, Rick Contratto and Joe Johnson testified for respondent.

At the Black Mesa mine Peabody uses a multiple seam mining process for its five seams of coal (Tr. 70-72). The company uses a color coding system to differentiate between its coal seams (Tr. 71). These seams are respectively designated, from the surface down, as green, blue, red, bottom red, and yellow (Tr. 71; Exhibit F).

The coal bench is the area where the dragline and other pieces of mining equipment are located. The highwall is the face left by the dragline and the stripping equipment (Tr. 71; for a cross section view see Exhibit B).

Black Mesa uses a Marion 8750 dragline to first cut a keyway or ditch (Tr. 71-73). A drill crew then drills through the overburden to the first coal seam (Tr. 73). The dragline removes the drilled and shot overburden by depositing it in an area that has already been mined (for an illustration of the pit configuration see Exhibit C).

The highwall in the pit results when the overburden is removed. The removal of the overburden exposes the coal seam which is, in turn, drilled and shot. Shovels and other equipment load the coal onto trucks (for an illustration of coal loading operation see Exhibit D).

The mining sequence continues as the dragline removes the coal. Drilling, shooting, and loading activities follow behind the dragline (Tr. 74). The dragline, using the wide radius of its shovel, spoils the overburden and later the parting <sup>1/</sup> into a pit where the coal has already been removed (Tr. 74).

In the J-1 pit the bench was 130 feet wide. Peabody tries to maintain that distance but it narrows slightly at the bottom coal seam (Tr. 15).

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1/ Parting is the interburden between coal seams.

As a result of this citation MSHA requires a berm when the topmost (green) coal seam is exposed. The berm must be installed prior to any shooting. The berm is approximately six feet high and sixteen and one half feet wide at the base (Tr. 77). This berm must later be pushed off so the crews can shoot the coal beneath it.

MSHA also requires a third berm on the parting between the second and third seams (blue and green seams). This berm must, in its turn, be pushed off so the drilling crews can fragment the area beneath it. The dragline, in turn, removes the parting (Tr. 79).

The construction and removal of the berms continues as the mining progresses. The progression is both downward as the coal seams are exposed and lateral as the dragline removes the coal or the parting (Tr. 79-80). In this mining progression the MSHA citation requires that 12 berms be constructed and removed (Tr. 80).

The pit, designated as J-1, is the working pit of an active surface coal mine. Haulage trucks and loader crews are actively engaged in the coal removal. The haulage trucks, 16 feet 8 inches wide, primarily drive down the middle of the bench, or a bit to the highwall side (Tr. 82). In the pit there is one direction of traffic. Once the trucks reach the ramp they go out of the pit area until they reach a permanent haulage road. The trucks then travel to a preparation site (Tr. 88).

In the opinion of Peabody's engineer an active pit area is not a roadway. One reason is that the area changes daily. Haul roads at mines are designed to certain specifications and they take into consideration the speed of vehicles using them. Also the drainage of a haul road is a factor to be considered (Tr. 82, 83).

Peabody uses track type and rubber-tired dozers to emplace its berms. When necessary dump trucks haul in material to construct the berms (Tr. 81).

Berms, such as MSHA requires here, are not required at any other mine in the West (Tr. 84).

In the opinion of Peabody's engineer a berm in place here would not have prevented the accident. Yazzie was entering the coal shot area and his duties would have required that he level the area (Tr. 84).

Peabody's industrial engineer conducted a time and motion study relating to the installation and removal of berms (Tr. 97). A videotape (Exhibit U) shows the building of a berm with a Clark 380 rubber-tired dozer (Tr. 98-100). The front portion of the

dozer goes out over the edge of the bench when building and even more so when removing the berms (Tr. 98-102). In building a berm six feet high the average dozer cycle <sup>2/</sup> is .47 minutes.

Normally berms are built during the third shift, from midnight until 8 a.m. Northington has monitored over 4000 dozer cycles (Tr. 101).

When berms must be built at the edge of parting seams then material must be hauled in to construct the berms since there is no loose material available. Peabody estimates, that on an annual basis, it has hauled in 150,000 yards of material or about 2,000 truck loads, to build such berms (Tr. 104).

In removing the berms the dozer operator, whose vision is blocked by his equipment, goes right to the edge. Some operators have stated this was unsafe (Tr. 105).

Trucks in the pit never operate closer than within 80 to 100 feet of the edge of the bench (Tr. 106).

Peabody submitted a time and motion study comparing the "before and after" exposure of its men and equipment in abating this citation. All calculations were keyed to an annual basis (Tr. 107; Exhibits V, W, X).

Before the issuance of this citation Peabody's activities resulted in its miners and equipment being exposed to the hazard of being within 20 feet of the ditch edge for 1,085.8 hours. This exposure was primarily the time required to drill a 20 foot zone next to the edge of the ditch. This exposure is still incurred because it is still necessary to drill and remove the coal in the 20 foot zone (Tr. 108). But the exposure in this zone is now increased to 1,880.6 hours. This 73 percent increase results from the construction and removal of the berms now required by MSHA (Tr. 109; Exhibit X).

Before the berms were required the only dozer exposure to the ditch edge occurred during the cleaning of the coal. This was for 40.48 hours (Tr. 109; Exhibit W). As a result of abating the citation the exposure has increased to 831.5 hours, an increase of 1954 percent.

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<sup>2/</sup> A cycle is the elapsed time from when the dozer starts forward, reverses its motion, and again starts forward (Tr. 99, 100).

In removing the coal, Peabody's rubber-tired dozer cuts a 14 foot swath and approaches the edge 7,619 times (Tr. 109; Exhibit V). Since Peabody is now required to build and remove berms there are 103,451 cycles to the ditch edge, an increase of 1,612 percent (Tr. 109-110; Exhibit V). Peabody has constructed 58 miles of berms to abate this citation (Tr. 115, 116).

Peabody places berms on its active haul roads where there is vehicular traffic traveling "at a good speed" (Tr. 125).

In the opinion of mine superintendent Joe Johnson the standard does not apply to the working area of the pit. The company is constantly mining this area. MSHA has never previously cited the company for failure to have berms in an active pit area. But the company has been cited due to an eroded berm on a haul road (Tr. 151, 154, 155).

Don Holt, Peabody's safety director for its mines in Kentucky and Ohio, is familiar with MSHA regulation § 1605(k). In Holt's opinion the purpose of the regulation is to provide a guide on a haul road to keep vehicles within a confined area. Further, in Holt's opinion, the section does not apply to the working pit of surface mines (Tr. 132-134).

In the mines in the eastern portions of the United States the working coal pits are 45 to 80 feet wide. It would practically shut down such mines if MSHA requires berms as it does here. MSHA does not now require berms in other active working pits (Tr. 136, 137).

Summary of the Evidence adduced at the  
hearing in September 1984

Peabody's Evidence

Buck Woodward, Peabody's planning engineer, testified that on July 30, 1984 he toured the El Paso operations including the pit where Citation 159662 was issued for a violation of the berm standard. (Supplemental transcript at pages 7 and 8).

El Paso mines limestone as an aggregate for concrete. In its mining process the company initially removes 30 feet of red rock. The rock has no commercial use (S. Tr. 10, 11).

After the removal of the initial overburden El Paso shoots a 10 foot by 10 foot pattern and removes the rock from two lifts. The blasting is done in a perpendicular direction towards the highwall (S. Tr. 11, 18). (Drill holes can be seen in Exhibit Y).

On the other hand, at Peabody's Black Mesa surface coal mine, the overburden coal and parting is mined from the middle of the pit in a lateral direction (S. Tr. 18).

On the day of Woodward's visit at El Paso the top bench was 200 feet wide. As the rock is mined this bench will be reduced to a width of 60 feet (S. Tr. 12, 13). The citation issued to El Paso which evolved into the Commission decision, previously cited, alleges the El Paso bench was as narrow as 45 feet (S. Tr. 28). The coal bench at Black Mesa cannot vary and it remains at a fairly constant width of 130 to 140 feet (S. Tr. 21).

It takes one to two years to reduce the El Paso bench to a 60 foot width from the 200 foot width. But at Black Mesa the dragline removes a 400 by 200 foot wide area in four and a half days (S. Tr. 18). El Paso does not have any large overburden stripping equipment (S. Tr. 19).

While at El Paso Witness Woodward observed the company's vehicles operating at 20 to 25 mph. At Black Mesa the trucks and the coal removal equipment operate at 3 to 5 mph. The Black Mesa vehicles only attain the greater speeds when they reach the ramps (S. Tr. 17, 19, 20).

On the day of Woodward's visit the El Paso berm was 40 feet from the edge of the lower lift face. There is a road to each side of the berm. The haulage road, towards the highwall side, is used for pit inspection and rock removal from the top lift. The road between the berm and the drop off is used for drilling and shooting equipment and supervisors' vehicles. It is also necessary to use the road between the berm and the edge to knock off whatever loose rock remains after a blast (S. Tr. 14-16).

The El Paso berm in place in July, 1984 had been there for six months. It would likely be there another six months (S. Tr. 14). On the other hand, the Black Mesa berms can be changed within three hours (S. Tr. 20, 22).

The trucks at El Paso, according to Citation 159662, (issued in the El Paso case) were being operated within 10 to 14 feet of the edge. On the other hand, at Black Mesa the Peabody haulage trucks get no closer than within 60 feet from the edge of the bench (S. Tr. 21, 29, 32, 33).

There is more activity at a coal bench than at a rock quarry (S. Tr. 22).

Witness Woodward concluded that substantial differences exist between a surface coal mine and a rock quarry. As a result it is suggested that the berm standard is not applicable to

Peabody. These differences include the distances the vehicles are from the edge (60 feet versus 10 to 14 feet); the speed of the vehicles in the pit (3 to 5 mph versus 20 to 25 mph); the width of the pit (a constant 130 to 140 feet versus 200 reducing to 45 to 60 feet). The duration the berms must remain in place (3 hours versus one to two years) (S. Tr. 25, 28, 29, 31, 34).

#### MSHA's Evidence

Sidney R. Kirk, an MSHA supervisory inspector, issued Citation 159662 against El Paso Rock Quarries (S. Tr. 38, 39, 48).

Witness Kirk agreed that his testimony before Judge Moore in the El Paso case was more correct than his recollection at this hearing. When the El Paso citation was issued the quarry bench was 60 to 80 feet wide. Vehicles traveled within 10 to 12 feet of the edge (S. Tr. 49, 50; El Paso transcript at page 26).

When he inspected the El Paso site Inspector Kirk learned the company had a speed limit of 5 to 8 mph. He also observed vehicles traveling at that speed (S. Tr. 41, 42). In his opinion the El Paso vehicles in the limited bench area could not attain speeds of 20 to 25 mph (Tr. 43).

The inspector further indicated that the berm shown in the July 1984 photograph did not comply with the berm regulation, 30 C.F.R. § 56.9-22. In his opinion the berm should have been located between the drill holes and the edge (S. Tr. 45).

Inspector Kirk indicated he has not inspected a surface coal mine nor enforced any MSHA regulations concerning such a mine (S. Tr. 48, 53).

In the inspector's view the length of time the El Paso berm remains in place depends on the demand for the product. At the time of his El Paso inspection the berm could have been removed almost every twenty-four hours (S. Tr. 44, 45).

#### Discussion

Credibility determinations arise in the case. Particularly, a conflict exists between the testimony of Witnesses Woodward and Kirk. I credit Kirk's version as to the speed of the El Paso trucks on the date he issued Citation 159662. Mr. Kirk was obviously at the El Paso site on that day. Mr. Woodward was not present.

On the other hand, I credit Peabody's evidence as it relates to the operation of the Black Mesa Coal surface coal mine.

Peabody's witnesses have the expertise derived from participating in the daily mining of coal at that location.

The threshold issue presented here is whether the Commission decision in El Paso Rock Quarries, Inc., supra, is controlling precedent. In the initial decision of this case, 6 FMSHRC 612 (March, 1984), this judge concluded he was bound by the decision. In El Paso the Commission considered whether a violation of the applicable berm standard occurred. The particular berm standard in El Paso applied to metal and non-metallic open pit mines but it has the same wording as the standard in contest here. In El Paso the Commission held that a bench <sup>3/</sup> in a quarry is an "elevated roadway" within the meaning of the standard. The El Paso decision recited that the operator's trucks were operated 40 feet above a lower bench and the Commission held that "under the facts of this case, the quarry bench where the haulage trucks were driven is indeed an elevated roadway within the meaning of Section 56.9-22," 3 FMSHRC at 36. The El Paso decision itself does not state how close the El Paso vehicles operated to the edge of the bench.

For the reason hereafter stated I find that the El Paso decision is not controlling. It now appears that there are substantial differences between the El Paso rock quarry and the Peabody multiple seam surface coal mine. In the El Paso scenario the trucks were operated within 10 to 12 feet of the edge of the bench. On the other hand, Black Mesa trucks do not operate closer than 60 feet from the edge of the fairly constant 120 to 140 foot wide bench. Substantial differences also arise in the duration of time the berms are required to be in place and in the width of the bench.

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3/ In El Paso the Commission, in a footnote, stated:

The term "bench" is in part defined by A Dictionary of Mining, Mineral, and Related Terms, Department of the Interior (1968), as:

A ledge, which, in open-pit mines and quarries, forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank of bench face. The mineral or waste is removed in successive layers, each of which is a bench, several of which may be in operation simultaneously in different parts of, and at different elevations in an open-pit mine or quarry.

Based on the foregoing factors I conclude that El Paso Rock Quarries, supra, is not a binding precedent.

The secondary issue is whether Peabody violated the berm standard. For the reasons hereafter stated I conclude that no violation occurred.

It is clear that berms are required on "elevated roadways." Further, a roadway is used to transport coal, equipment, and personnel. A similar dictionary definition recites that a road is an "open way for vehicles, persons, and animals", Webster's New Collegiate Dictionary (1979) at 993.

I do not find on this record that any vehicles transported coal, equipment or personnel closer than within 60 feet of the edge of the Peabody bench. The difference between operating not closer than 60 feet of the edge and operating within 10 to 12 feet of the edge is crucial. A distance of 60 feet is not insubstantial. An interstate highway lane measures 12 feet. If no vehicle is ever shown to have been operated within 5 such lanes of an edge, I cannot hold that the unused 60 foot portion can nevertheless be somehow denominated as a "roadway."

In his post trial brief the Secretary asserts that in deciding whether the travelway in question here is a roadway the Commission should be guided by the principle that the Act and the regulations should be construed liberally and expansively to effectuate the Congressional purpose and promote the safety of the miner. Hanna Mining Company, 3 FMSHRC 2045, 2048 (1981), MSHA v. Westmoreland Coal Company 606 F. 2d 417, 420 (4th Cir. 1979).

I have no quarrel with the law cited by the Secretary. However, I find it inapplicable in this case. Peabody's uncontroverted evidence concerning the building and removal of berms shows some hazards are involved in the process. Based on this evidence I cannot conclude that the safety of the miners is promoted in the activities required to abate this citation.

The Secretary further relies on his several policy memoranda interpreting this regulation (Exhibits P7 and P8). The difficulty with his memoranda is that it assumes facts not established on the record. In addition, the inspection manual and MSHA's policy memorandum (Exhibits P7 and P8) do not clarify the problem. The manual merely states that § 77.1605(k) applies to an "elevated haulage road"; further, such roadways are "roadways." The policy memoranda recites that § 77.1605(k) applies to "all elevated roadways" and berms are required on all exposed banks of "elevated roadways."

This 60 foot portion of the bench cannot now automatically become a roadway because it has not been used to transport coal, equipment and personnel. True, dozer operator Yazzie was at the edge of the bench but his duties included removing the coal. The coal itself was in a condition of upheaval as a result of the blasting. I decline to defer to the Secretary's interpretation of the regulation in these circumstances.

In support of his position the Secretary also relies on Cleveland Cliffs Iron Company, 3 FMSHRC 291 (1981) and Rock Valley Cement Block and Tile 2 FMSHRC 1906, 1914-1916; MESA v. Peabody Coal Company, VINC 77-102-P.

The foregoing cases are clearly distinguishable from the instant case. In each of these cited cases there was some use by vehicles, albeit minimal, of the travelway that the Secretary felt should be bermed.

In Cleveland Cliffs the issue centered on whether certain use of a road constituted hauling. The Commission held that the term "hauling" includes conveying men, ore, supplies or materials along elevated roadways where the roadways are used in the normal mining routine, 3 FMSHRC at 293. As previously observed there was no hauling of any type closer than 60 feet from the edge of Black Mesa's bench.

In Rock Valley Cement, Block and Tile Judge Koutras rejected the operator's argument that a roadway and the berm requirement can only exist in circumstances which clearly show that the mined materials are regularly hauled out of the mine along clearly defined haulage roadways designed and regularly used for such purposes. The cited decision is not controlling as there is no roadway use whatsoever of the 60 foot area under discussion in the instant case.

In Mesa v. Peabody Coal Company, the arguments concerned whether the roadway in question was elevated and whether a distinction existed between an access road and a haulage road.

The parties waived further briefs after the supplemental hearing but the oral arguments were entered on the record.

The Secretary initially claims El Paso Rock Quarries, supra, is controlling since identical standards are involved. This point has been addressed and found to be without merit.

The Secretary further argues that the differences between the El Paso case and this case are not crucial. Specifically, it is contended the distance the Peabody trucks operate from the edge of the bench relates to gravity and not to the fact of a violation.

I am not persuaded. I refuse to apply the standard in a vacuum. The Secretary bears the obligation to prove that the activity he seeks to control is fairly within the terms of the regulation.

The Secretary states that not requiring berms would lessen the safety of the miners. This issue has been reviewed and found to be without merit.

In its post-trial brief filed after the initial hearing Peabody also raised certain issues. These require discussion.

Peabody asserted it should prevail because the regulation is vague and lacks clarity. Peabody further cites the failure of MSHA to previously enforce the regulation at this site and elsewhere as to coal seam benches.

The foregoing position is basically a plea in estoppel. But it is established that estoppel does not apply against the federal government. Cf. King Knob Coal Company, 3 FMSHRC 1417, 1421 (1981).

Peabody also argues that its time study (Witness Northington) and its video tape (Exhibit U) are not offered to prove that MSHA's enforcement of § 77.1605(k) causes a greater hazard. But it argues that if MSHA interprets the regulation in such a way that dangers are increased then that interpretation is not correct. In short, Peabody agrees that berms on an elevated roadway increase safety. But a coal bench is not a roadway and if MSHA interprets it to be so then MSHA is wrong because there is a clear increase in danger. It is axiomatic that the greater the exposure to the hazard, the more likely an accident. Peabody's uncontroverted evidence establishes that the placement of berms can be hazardous (Tr. 143). Further, the type of berms MSHA requires here (some 58 miles) are transient. Their duration can be as short as three hours (Tr. 144). But a berm on a bona fide elevated roadway is not so transient (Tr. 83).

While Peabody's video tape and support testimony were generally admissible it was basically a revisit to the diminution of safety, or, as it is sometimes called, the greater hazard doctrine. Peabody apparently anticipated an adverse ruling because it asserts that Penn Allegh, 3 FMSHRC 1392 (1981), is not controlling because the case dealt with explicit cabs and canopies regulations. But, in the instant case, the parties are arguing over a relatively vague standard.

I disagree. Peabody seeks to invoke the diminution of safety, or the greater hazard doctrine. In Penn Allegh the

Commission refused to approve such an attempt to short-circuit the Act. The Commission observed that when those situations exist where the application of the standard diminishes, rather than enhances, miners' safety the operator may petition the Secretary of Labor for relief from the application of the standard. The Act provides a set procedure for granting or denying the relief sought. Penn Allegh at 1397. In addition, there are detailed regulations governing the processing of such petitions, 30 C.F.R. Part 44.

In sum, Peabody's evidence seeking to establish the diminution of safety, or greater hazard doctrine, is rejected.

Peabody's further arguments are that MSHA failed to offer as a witness the inspector who wrote the citation and in addition failed to offer in evidence the citation itself. These arguments lack merit. Inspector Denning testified as to the issuance of the citation (Tr. 28). He further authored Exhibit P1, an extensive report of this fatality. In Exhibit P1 MSHA entered its finding as follows: "A berm was not provided on the elevated outer back of the haulage road in pit 001-0 from Ramp C for a distance of about 600 feet along the Blue seam coal bench, a violation of Section 77.1605(k), 30 CFR."

Peabody's claim that MSHA's interpretation would shut down the surface coal mine operations in the United States is rejected.

Peabody has obviously not shut down this surface coal mine operation at the Black Mesa Mine in Navajo County, Arizona. Peabody's evidence and argument that the mines in the eastern part of the United States would be shut down must await the detailed evidence in such a case. In short, I decline to rule on a hypothetical situation particularly here, where I fail to find a violation.

For the reasons stated herein I conclude that Citation 2006837 and all penalties should be vacated.

#### Citation 2006838

In this citation the Secretary of Labor seeks a civil penalty of \$241 because Peabody's employee Yazzie failed to wear a seat belt thereby violating the mandatory standard published at 30 C.F.R. § 77.1710(i) which provides:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

(i) Seat belts in a vehicle where there is a danger of overturning and where roll protection is provided.

## Issue

Did Peabody violate the seat belt regulation?

### Summary of the Evidence

All of the evidence relating to this citation was heard at the initial hearing of the case in December, 1983. Neither party sought to offer evidence on this subject at the supplemental hearing.

MSHA's evidence shows that Yazzie was not wearing a seat belt at the time of the accident (Tr. 28; Exhibit P1). MSHA, in its written report, concluded the failure to wear the seat belt in the vehicle was a contributing factor to Yazzie's death (Exhibit P1).

Peabody's mine superintendent indicated that the company requires that seat belts be worn. The workers are informed of this requirement through task training, annual retraining, individual contacts and general discussion (Tr. 153).

If an employee is caught not wearing a seat belt he is given a warning. If it occurs again he receives a written warning (Tr. 153).

Peabody's safety manager and its pit boss confirmed the superintendent's testimony. Further, he indicated that the company reinstalls seat belts if they are damaged or removed (Tr. 117, 120, 121, 129, 147). Equipment operators have been disciplined for failing to wear seat belts (Tr. 130, 148, 149). The discipline graduates to suspension or discharge (Tr. 130).

### Discussion

The Secretary, in his post trial brief, is aware of the Commission decision in Southwestern Illinois Coal Corporation, 5 FMSHRC 1672, (October 1983). But the Secretary claims the majority decision violates the long line of strict liability cases imposed by the Act. Further, the Secretary argues that the minority view is more persuasive.

The Secretary's contentions are rejected. I am obliged to follow the majority view in Southwestern Illinois Coal Corporation.

The Secretary apparently anticipated this ruling and he argues that, in any event, Peabody has not satisfied the criteria of North American Coal Company, 3 IBMA 93, cited in Southwestern Illinois. The Secretary's argument is this: Pit boss Contratto had never given a written seat belt warning to anyone and he was unable to present actual examples of a warning. I agree the

evidence shows that Contratto, personally, had never given an employee a written disciplinary notice for failing to wear a seat belt (Tr. 148, 149). But the Secretary misconstrues the evidence in the transcript at pages 149 and 150. Contratto testified that there there have been written disciplinary actions. But he hadn't brought such notices to the hearing (Tr. 148-150).

On this record witnesses Contratto, Johnson and Cook establish that Peabody was diligent in the enforcement of its seat belt regulation (Tr. 120, 121, 129, 130, 153, 154). Southwestern Illinois criticized the operator because the wearing of belts was delegated to the discretion of each employee. This is not the situation here. The witnesses establish that Peabody was diligent in its enforcement of the seat belt regulation.

I further note that no facts indicated that the company knew Yazzie had his seat belt off at the time of the accident; if, in fact, it was off (Tr. 29).

I reject the Secretary's arguments.

For the foregoing reasons Citation 2006838 and all penalties therefor should be vacated.

#### Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Peabody did not violate the mandatory standard published at 30 C.F.R. § 77.1605(k), and all proposed penalties therefor should be vacated.
3. Peabody did not violate the mandatory standard published at 30 C.F.R. § 77.1710(i), and all proposed penalties therefor should be vacated.

#### ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. Citation 2006837 and all proposed penalties therefor are VACATED.

2. Citation 2006838 and all proposed penalties therefor are VACATED.

  
John J. Morris  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

NOV 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 84-51-D  
ON BEHALF OF : MSHA Case No. BARB CD 84-14  
GREGORY BROWN, :  
Complainant : No. 1 Mine  
v. :  
A & L COAL COMPANY, INC., :  
Respondent :

DECISION

Appearances: Darryl A. Stewart, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Nashville, Tennessee, for Complainant;  
William R. Seale, Esq., Mitchell, Clarke,  
Pate, Anderson & Wimberly, Morristown,  
Tennessee, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

In a complaint filed with the Secretary of Labor on January 27, 1984, Complainant Gregory Brown alleged that he was reassigned from the position of cutting machine operator to cutting machine helper on November 9, 1983, was transferred to the afternoon shift on November 21, 1983, and was discharged on December 21, 1983, all because of activity protected under the Federal Mine Safety and Health Act of 1977. On April 2, 1984, the Secretary filed an application for temporary reinstatement on Brown's behalf. On April 3, 1984, the Commission's Chief Administrative Law Judge issued an order directing Respondent to temporarily reinstate Complainant in the position from which he was terminated or in a comparable position with the same or equivalent work duties. Complainant was restored to the payroll and later returned to the job of cutting machine helper in accordance with the order. On April 20, 1984, Respondent filed a petition for hearing on the order of temporary reinstatement. Pursuant to notice, a hearing was held in Clinton, Tennessee

on April 27, 1984. Following the hearing, I issued an order that the temporary reinstatement order should remain in effect based on my finding that the evidence failed to establish that Mr. Brown's complaint to the Secretary was frivolously brought.

The Secretary filed his complaint with the Commission on May 4, 1984. Respondent filed its answer on May 21, 1984.

On May 18, 1984, Complainant left work because of conditions he alleged were unsafe. Respondent treated his leaving as a voluntary quit. At the hearing, the parties agreed that I should decide whether Complainant's leaving work on May 18, 1984, was for activity protected under the Act, and whether Respondent's refusal to put him back to work was violative of section 105(c).

Pursuant to notice, the case was heard on June 12 and 13, 1984, in Clinton, Tennessee. Gregory Brown, Don McDaniel, Henry W. Disney, Gary E. Lowe and Vernon Ray Hawn testified on behalf of Complainant; Oscar Phillips, Howard Goad, Jim Brubaker, Gary Phillips, and Arvil Daugherty testified on behalf of Respondent. Both parties have filed posthearing briefs. Based on the entire record, including the record made at the hearing on the temporary reinstatement order, and considering the contentions of the parties, I make the following decision.

#### FINDINGS OF FACT 1/

1. At all times pertinent to this proceeding, Respondent was the operator of an underground coal mine in Morgan-County, Tennessee, known as the No. 1 Mine.

2. Complainant Gregory Brown was employed beginning in about 1979 by the B & D Coal Company, a predecessor to A & L Coal Company, as a cutting machine helper. In 1980 or 1981, he became a cutting machine operator. After a period of time off work, he was reemployed as a cutting machine operator beginning March 15, 1981. In 1983, A & L Coal Company, Inc., took over the mine from B & D. Complainant continued working for the new company as a cutting machine operator.

1/ Separate transcripts were made of the hearing on the temporary reinstatement order and the hearing on the merits. Citations to the former transcript are designated herein as TR(A); the latter are designated TR.

3. On about November 2, 1983, while operating the cutting machine at the subject mine, Complainant sustained electrical shocks from the frame of the machine which had become energized. Complainant told the mechanic Oscar Phillips and the foreman Carlos Lester that the machine was shocking him but they both apparently refused to believe him.

4. Arvil Daugherty, the principal owner of Respondent and the operator of the mine, knew on November 2 or 3 that the cutting machine "was getting hot," that is, it was shocking people (Tr. 336).

5. The following day, November 3, Complainant noticed that the frame ground had been removed from the cutting machine. He told Oscar Phillips that it was against the law to run the machine with the ground removed. Phillips replied: "You can run it or be replaced" (Tr. 17). The machine, however, had been torn down to try to determine why it failed to shut off. It was not operated on November 3 on the day shift.

#### DISCUSSION

There is some conflict and confusion in the record as to when the cutting machine frame became energized and when the ground wire was removed. I accept Complainant's testimony as to his being shocked when contacting the frame, and as to his complaints to Phillips and Lester. I accept Phillips' testimony that the machine was "torn down" to attempt to locate the problem on Thursday, November 3, 1983.

6. -On November 3, 1983, after his shift, Complainant attempted to call the local MSHA office to report the condition of the cutting machine, but it was closed. He asked his wife to call the following day. His wife called the MSHA office on November 4, 1983, and an inspector came to the mine the same day.

#### DISCUSSION

Respondent argues that Complainant's testimony that his wife called MSHA is hearsay and insufficient proof that such a call was made. There is no dispute that in fact a call was made, which resulted in an MSHA investigation. Since this is so, I accept Complainant's testimony that his wife made the call as probative evidence that she did so. Whether technically hearsay or not, the testimony is inherently trustworthy and is corroborated by other evidence.

7. Don McDaniel, a Federal coal mine electrical inspector came to the subject mine on November 4, 1983, at about 9:00 a.m. Following an inspection he issued an imminent danger withdrawal order under section 107(a) of the Act, because of 11 temporary splices in the trailing cable of the cutting machine, because the frame ground was removed from the frame of the machine and the ground wire had 300 volts of electricity coming from a short in the cable. The machine was energized but was not being operated at the time the order was issued. He also issued citations charging violations of 30 C.F.R. § 75.603 and 30 C.F.R. § 75.701-3 for the same conditions. When he arrived at the mine, the inspector told Daugherty that he was there on a complaint concerning the cutting machine. Daugherty asked him if it was a man or a woman who made the complaint. Complainant had previously told some of the miners that his wife called MSHA.

8. The order and citations were terminated at 2:00 p.m., on November 7, 1983, after a new trailing cable was installed on the cutting machine and the ground wire was attached to the machine. Respondent had ordered a new cable for the machine on the day before the inspection.

9. During the period from January to November, 1983, Respondent on a number of occasions had to repair or replace the hydraulic pump on the cutting machine operated by Complainant. (The same machine was also operated by another employee on the second shift). On about November 8, 1983, the foreman Carlos Lester told the operator Arvil Daugherty that the pump had quit working because it was too hot. Daugherty decided to change Complainant to the job of cutting machine helper "to see if it was him or the machine" that was causing the pump problem (Tr. 323). He received the same rate of pay (\$8 per hour) as a helper that he received as a machine operator. The problems with the hydraulic pumps did not continue after Complainant ceased operating the cutting machine.

10. After about a week and a half as a helper on the day shift, Complainant was transferred to the night shift as a cutting machine helper. The night shift had been opened about "the first of November" . . . "or October," 1983 (TR A 340-341). The reason it was opened was to produce more coal, since Respondent had a contract to sell all the coal it could produce.

11. Complainant was laid off December 20, 1983, along with three other miners, one of whom was Daugherty's son. Daugherty stated that the lay off was caused by having a stockpile of coal and "having extra men that we didn't need." He stated that Complainant was selected as one of those laid off because of the trouble with the cutting machine while he operated it. Complainant worked at a coal mine for a Clint Johnson for 3 weeks and 2 days at a wage of \$5 per hour after he was laid off by Respondent.

12. On application of the Secretary, Complainant was ordered reinstated by an order issued April 3, 1984, and he was restored to the payroll and subsequently to the position of cutting machine helper. He was paid \$8 per hour.

13. Complainant continued working as a cutting machine helper until May 18, 1984. On that date (a Friday on the evening shift), four miners on the crew left the mine because of "the way he (Gary Phillips, the acting foreman) wanted to run the coal." The crew members thought it unsafe to cut in a certain sequence but Phillips said "Well, it doesn't matter, we're going to cut it to get the coal" (Tr. 56). Neither Complainant nor the other miners told the boss why they were leaving the mine. Complainant also testified that he had become ill from the fumes of a gasoline powered chain saw which was used underground to cut timbers, but he did not mention this to anyone.

14. On Monday, May 21, 1984, Complainant reported to the mine office. Mr. Daugherty told him "You Quit, you ain't got no job" (Tr. 58). Complainant did not tell Daugherty why he left work on the previous Friday, but left the premises.

15. About a week or 10 days after leaving Respondent's mine, Complainant went to work part time (16 to 24 hours per week) in a junkyard at a wage of \$4 per hour.

#### STATUTORY PROVISION

Section 105(c) of the Act provides in part:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act

because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of

miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

#### ISSUES

1. Whether the demotion of Complainant in November, 1983, or his lay off in December 1983, were caused by activity protected under the Mine Safety Act?
2. Whether Complainant's leaving work in May 1984, and Respondent's refusal to take him back constituted a constructive discharge for activity protected under the Act?
3. If either or both of the foregoing questions are answered in the affirmative, to what relief is Complainant entitled?

#### CONCLUSIONS OF LAW

1. Respondent was at all times pertinent hereto a mine operator. Complainant was in Respondent's employ as a miner. The parties are subject to the Act, and I have jurisdiction over the parties and subject matter of this proceeding.
2. In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a Complainant bears the burden of production and proof to show (1) that he engaged in protected activity and (2) that an adverse action

against him was motivated in any part by the protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this matter, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears a burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion that illegal discrimination has occurred does not shift from the Complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983) (approving the Commission's Pasula-Robinette test).

### 3. The November and December 1983 incidents

#### PROTECTED ACTIVITY

I have found (Finding of Fact No. 3) that Complainant Brown told the mechanic and the section foreman on November-2, 1983, that he was receiving shocks from the frame of the cutting machine. These statements are clearly safety complaints and constitute activity protected under the Act. The following day, Complainant told the mechanic that it was against the law to run the cutting machine with the ground wire removed. I conclude that this statement was protected even though it was made to the mechanic who was not technically a management employee. The telephone call to MSHA made by Complainant's wife at his request to report the condition of the machine was also protected activity (Finding of Fact No. 6). The telephone call resulted in an MSHA inspection, and the issuance of an imminent danger closure order and a citation. Insofar as Complainant initiated and was involved in these activities, he was involved in activities protected under the Mine Act.

### ADVERSE ACTION

On November 9, 1983, Complainant's job was changed from cutting machine operator to cutting machine helper. Respondent paid all its miners the same wage and thus Complainant did not suffer a reduction in pay when his job was changed. However, the job was less desirable and required less skill. I conclude that the job change constituted adverse action. On about November 18, 1983, Complainant was transferred from the day shift to the evening shift. He continued to work as a cutting machine helper. Although Complainant found the evening shift less desirable for personal reasons, I cannot conclude that the job change in any way downgraded his position. I therefore conclude that it did not constitute adverse action. On December 21, 1983, Complainant was laid off. This clearly constituted adverse action.

### CAUSAL CONNECTION

Complainant Brown was downgraded on November 9, 1983, and laid off on December 21, 1983. Were either or both of these adverse actions motivated in any part by the protected activity described above? Respondent in the person of Daugherty was aware of the unsafe condition of the machine (Finding of Fact No. 4). Respondent in the person of section foreman Lester and mechanic Phillips knew that Gregory Brown was complaining about the unsafe condition of the machine. When the inspector came to the mine, Daugherty asked him whether "a man or a woman called him." Daugherty had no explanation for this rather odd question except "curiosity" (Tr. 339). I conclude (1) that Daugherty wanted to know who made the complaint and (2) that he thought an answer to his question (which was not given) would give him a clue. Although there is no direct evidence of this, I infer in part from Daugherty's evasive answers to the question at the hearing on the temporary reinstatement order as to whether Daugherty inquired as to the source of the call to MSHA (Tr. A 74-75), that Daugherty believed Gregory Brown had the call made to MSHA. The withdrawal order was terminated November 7, and Complainant was demoted to helper on November 8, 1983. I conclude that one reason for the demotion was the protected activity referred to above. Complainant therefore has made out a prima facie case of discrimination under the Mine Act for this demotion. On December 21, 1983, Complainant and three others were laid off (one of them, Daugherty's son, was call back after the Christmas vacation) ostensibly because too much coal was

being stockpiled. Respondent is a non-union mine and does not have any seniority rules. Daugherty's explanation of how he determined which employees to lay off is confusing and not entirely convincing. I conclude that here too he was motivated in part to lay off Gregory Brown because of Brown's protected activity.

The more difficult question in this case is whether the evidence shows that Respondent would have taken the adverse action against Complainant for unprotected activity alone. I have accepted as factual Respondent's contention that he had unusual problems with hydraulic pumps on the cutting machine while Complainant was operating it, and these problems disappeared after Complainant was taken off the machine. (Finding of Fact No. 9). Although Complainant was apparently regarded as a good worker by his foreman (who was not called as a witness by Respondent), it was reasonable for management to remove him as machine operator "to see if it was him or the machine" which caused the trouble. I conclude with respect to the removal of Complainant from his machine operator's job, Respondent would have taken this action for unprotected activity alone. What about the lay-off? When asked why he laid off Complainant rather than some other employees, Daugherty answered "well, I had went almost trouble-free with the cutting machine for almost a month and maybe a little longer, was'nt having no more troubles. He had cost me a lot of money in the past" (Tr. 326). There is some evidence attempting to show that Daugherty was also motivated in part because Complainant's sister was responsible for the jailing of Daugherty's son. I do not accept this latter evidence as showing motivation for the lay off. I do not believe Daugherty's rather evasive statement that it was a motive. However, the evidence-concerning the problems with the pump shows a reasonable and credible motivation, and I accept it as establishing that the lay off was motivated in part by Complainant's unprotected activities. Much more difficult to answer is the question whether the adverse action would have been taken for the unprotected activities alone. The burden of proving what is an affirmative defense is on Respondent. Considering the confusing and conflicting testimony of Daugherty, I conclude that it has not carried its burden. I conclude therefore, that the evidence establishes that Complainant was laid off on December 20, 1983, in violation of section 105(c) of the Act.

#### 4. The May 18, 1984, incident

##### PROTECTED ACTIVITY

Complainant's leaving work on May 18, 1984, resulted from a reasonable, good faith belief that continuing to work as directed would be unsafe. Therefore, his leaving work was protected activity. Pasula, supra. However, an employee who leaves work for safety reasons is required to "communicate or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." Secretary/Duhmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 133 (1982). In the case before me, the evidence shows that neither Complainant nor any of the other miners who walked off the job with him made any attempt to tell management of their safety concerns. Complainant had a pending case with the Commission at the time, was represented by the Solicitor of Labor, and had been reinstated to his job by a Commission order. He clearly cannot be heard to plead ignorance of his rights and responsibilities under the Act.

##### ADVERSE ACTION

When Complainant returned to the mine the following work day, he was told by the operator, Daugherty, that he had quit. This is adverse action. However, he again failed to make any reference to his safety complaints. I conclude that no violation of 105(c) of the Act was shown because of Complainant's failure to communicate his safety concerns either before leaving the mine or when the adverse action occurred. The complaint of discrimination based on the May 18-21 incidents must therefore be dismissed.

##### RELIEF

Based on the above findings of fact and conclusions of law, I conclude: (1) Respondent did not violate section 105(c) of the Act by assigning Complainant to a different job on or about November 8, 1983; (2) Respondent violated section 105(c) of the Act in discriminating against Complainant by laying him off on December 20, 1983; (3) Respondent did not violate section 105(c) of the Act in treating Complainant's leaving the job on May 18, 1984, as a voluntary quit and refusing to rehire him on May 21, 1984. Complainant is entitled to back pay from December 21, 1983, to the date he was rehired pursuant to the order of temporary reinstatement with interest thereon based on the formula set out in the case of Secretary/Bailey v. Arkansas-Carbona,

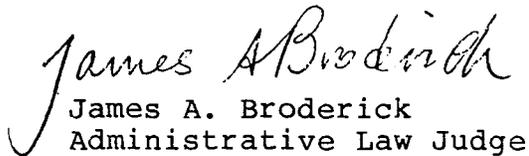
5 FMSHRC 2042 (1983). Any wages received during this period should be offset against his entitlement.

ORDER

Respondent is ORDERED to pay Complainant back wages from December 21, 1983 to the date of his reinstatement pursuant to Commission order with interest thereon as set out above, less any interim wages received in other employment. Respondent is ORDERED to expunge the employment records of Complainant of all references to his discharge on December 21, 1983.

Counsel are directed to confer and attempt to agree on the amount due pursuant to the above order and notify me within 30 days of their agreement or inability to agree. This decision is not final until a supplementary order is issued on back pay and interest.

The complaint of discrimination based on the May 18-21, 1984, incidents is DISMISSED.

  
James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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**NOV 9 1984**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 82-35-M  
Petitioner : A.O. No. 21-00820-05031 V  
v. :  
: Minntac Mine  
UNITED STATES STEEL :  
CORPORATION, :  
Respondent :  
:   
UNITED STATES STEEL : CONTEST PROCEEDING  
CORPORATION, :  
Contestant : Docket No. LAKE 82-6-RM  
v. : Order No. 486720; 9/10/81  
:   
SECRETARY OF LABOR, : Minntac Mine  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :  
:   
LOCAL UNION NO. 1938, :  
DISTRICT 33, UNITED :  
STEELWORKERS OF AMERICA, :  
Representative of the Miners :

DECISION ON REMAND

Before: Judge Broderick

On August 30, 1984, the Commission reversed my finding that there had not been an intervening clean inspection of the subject mine between the issuance of the contested 104(d)(2) order issued on September 10, 1981, and the prior 104(d)(1) order issued on March 31, 1981. However, the Commission affirmed my finding that the operator violated the mandatory standard involved and remanded the case for modification of the order based on new findings concerning whether the violation was caused by the operator's unwarrantable failure to comply with the standard, and concerning whether the violation was significant and substantial. The Commission decision states (page 8, fn. 3) that the contested order

issued under section 104(d)(2) should be modified to a section 104(d)(1) order, a 104(d)(1) citation or a 104(a) citation. However, as I read 104(d)(1) and 104(d)(2), a 104(d)(1) withdrawal order (issued at this mine on March 31, 1981) can only be followed by a 104(d)(2) order (assuming no intervening clean inspection), and not by a 104(d)(1) order. Where a clean inspection has intervened as in this case under the Commission decision, a violation can only be cited as a 104(a) citation or a 104(d)(1) citation.

Following remand, I issued a briefing schedule order on September 6, 1984. Both parties have filed briefs. Based on a reconsideration of the entire record, the Commission's decision on review, and the contentions of the parties, I make the following decision.

#### THE VIOLATION

The standard found to have been violated in this case requires that "safety belts and lines shall be worn when men work where there is danger of falling." Therefore, the violation ipso facto involves a safety hazard, namely the danger of falling.

#### UNWARRANTABLE FAILURE

My prior decision concluded that the violation was caused by the unwarrantable failure of the operator based on the fact that it was committed by a foreman who represented management. The Commission found my conclusion to be insufficiently explained for meaningful review by the Commission.

The most complete discussion of the meaning of the term "unwarrantable failure" is contained in the Interior Board of Mine Operations Appeals decision in the case of Ziegler Coal Company, 7 IBMA 280 (1977). The Board said at pages 294-295:

"Usually, where liability is dependent upon a determination of fault with regard to a person's knowledge, the fault typically concerns the person's knowledgeability as to matters of fact. Given the foregoing and inasmuch as the literal language of section 104(c) [of the Coal Act] implies that the fault encompassed in the 'unwarrantable failure' requirement is of the typical kind, we are of the opinion that both

the conferees and the House Managers were talking about an operator's failure to abate conditions or practices the operator knew or should have known existed and therefore should have abated prior to discovery by an inspector." [Emphasis in the original.]

Applying this rather ponderous language to the facts of this case, the foreman did not wear a safety belt "where a danger of falling should have been recognized under the circumstances" (Commission Dec. p. 4). The foreman asserted that the practice was not dangerous. The violation by its very terms involved a danger. I found that it occurred and the Commission affirmed. The foreman knew of the exposure (he could have fallen 18 feet). In the words of the Ziegler decision, this was a matter of fact. He should have known of the danger. Therefore, the foreman knew or should have known that the violative conditions or practices existed or occurred.

Is the knowledge of the foreman imputable to the operator?

In Pocahontas Fuel Co., 8 IBMA 136, 147-8 (1977), aff'd Pocahontas Fuel Co. v. Andrus, 590 F.2d 95 (1979), the Board found unwarrantable failure to comply on the basis that "the knowledge or constructive knowledge" of a preshift examiner was "properly imputable to Pocahontas."

In the case of Secretary v. Ace Drilling Co., 2 FMSHRC 790 (1980), the Commission stated (in a penalty case) at pages 790-1: "In determining liability for conduct regulated by the Act, the actions of the foreman cannot be separated from those of the operator. The foreman acts for the operator."

I conclude that where a foreman knew or should have known that he was engaging in a practice, which practice is found to be a violation of a mandatory standard, the operator can be found to have unwarrantably failed to comply with the standard.

#### SIGNIFICANT AND SUBSTANTIAL

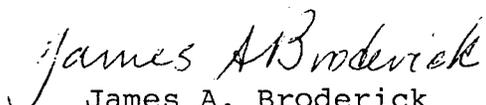
In my prior decision, I did not make findings on the question whether the violation was significant and substantial, because such findings are unnecessary in determining the propriety of a 104(d)(2) order. However, they are necessary in determining whether a 104(d)(1) citation or a 104(a) citation should have been issued. My decision

found that when the foreman exited the cooler, there were two openings through which he could have fallen to a dump zone more than 18 feet below. I concluded that there was "a danger of falling." As I previously explained the violation by its terms implies that it could contribute to a hazard. The hazard (falling 18 feet) clearly is reasonably likely to result in serious injury. See Secretary v. Mathies Coal Company 6 FMSHRC 1 (1984).

Therefore, I conclude that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

ORDER

Based upon the above findings and conclusions, IT IS ORDERED that Order No. 486720 is MODIFIED to a 104(d)(1) citation. The findings, conclusions and order related to the civil penalty proceeding in my decision of June 8, 1982, were not directed for review, and therefore are not part of the order of remand.

  
James A. Broderick  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**NOV 9 1984**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 84-51-M  
Petitioner : A.C. No. 21-02824-05501  
v. :  
: Cap's Pit  
TRI-CITY PAVING COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On November 7, 1984, the Secretary filed a motion to dismiss and approve a settlement agreement involving the two alleged safety violations involved in this proceeding.

The violations were originally assessed at \$3,300 and the parties propose to settle for \$2,150.

The withdrawal order charging a violation of 30 C.F.R. § 56.3-5, and the citation charging a violation of 30 C.F.R. § 56.3-1 both were issued following an investigation of a fatal accident, in which a front-end loader operator was killed when the bank under which he was working caved engulfing him and the loader with material from the pit wall. The order charged Respondent with working under a loose and dangerous bank and was originally assessed at \$3,000. The citation charged Respondent with failing to establish standards for the safe control of pit walls. It was originally assessed at \$300.

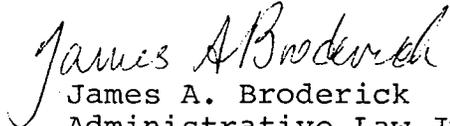
Respondent is a small operator and has had no history of violations in the 24-month period preceding the order and citation herein involved.

The motion states that the proposed penalty reductions (to \$2,000 and \$150) are justified because the Respondent's negligence was deemed moderate. The operator of the front-end loader had put himself in a dangerous position by working too

close to the highwall. He had previously been advised at safety meetings not to move too close to the highwall. The violation of 30 C.F.R. § 56.3-1 was considered a technical violation and would not in itself contribute to a hazard.

I accept the representations in the motion and conclude that the settlement is in the public interest.

Therefore, the motion is GRANTED and Respondent IS ORDERED to pay the agreed amount, \$2,150 within 30 days of the date of this order.

  
James A. Broderick  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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FALLS CHURCH, VIRGINIA 22041

NOV 14 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. VA 84-17  
Petitioner : A.C. No. 44-00246-03502A-A-59  
: :  
v. : J W L Construction Co., Inc.,  
: Pocahontas No. 1 Mine  
JOSEPH B. NECESSARY, :  
Respondent :

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Petitioner;  
William B. Talty, Esq., Tazwell, Virginia, for  
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding brought by the petitioner against the respondent pursuant to § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c), charging the respondent an alleged "knowing" violation of mandatory safety standard 30 C.F.R. § 77.200. At the time of the alleged violation, the respondent was employed by the J W & L Construction Company, an independent contractor doing some repair work on a mine refuse storage bin located at a mine owned and operated by Island Creek Coal Company. Respondent was the site foreman in charge of the repair work. Following a structural collapse of the structure, resulting in the death of three miners, and following an investigation by MSHA, the contractor, mine operator, and the named respondent in this case were charged with violations.

On November 9, 1982, a section 104(d)(1) citation, No. 2043640, was issued to both the mine operator and the independent contractor. Both were charged with a violation of 30 C.F.R. § 77.200, and the condition or practice cited is described as follows:

The mine refuse storage bin and supporting structure for the aerial tramway system was not maintained in good repair to prevent accidents and injuries. Repair and maintenance work performed by an independent contractor, J W & L Company, Inc., during miners' vacation (June 20 - July 11, 1982) resulted in the facility being left structurally unsound because two of the six bin support columns (stub columns) were not positioned during reinstallation to align with the main support columns. A resultant structural collapse of the facility occurred on August 24, 1982, fatally injuring three miners. James D. Lafon and Joe Necessary were the responsible officials for J W & L Company, Inc., during the repair work. Joe Shortt (plant foreman) and Mike Cole (Assistant maintenance foreman) were the responsible officials for the Virginia Pocahontas Preparation Plant facilities during the repair work. This citation is issued jointly to both the production operator (Citation No. 2043639 dated 11-9082) and the independent contractor (Citation No. 2043640 dated 11-9-82) for the violation described above.

On or about January 16, 1984, pursuant to 30 C.F.R. Part 100, MSHA's Office of Assessments served the respondent with a proposed civil penalty assessment of \$1,000 for the foregoing violation under section 110(c) of the Act. Respondent was charged with knowingly authorizing, ordering, or carrying out the independent contractor's violation of 30 C.F.R. § 77.200, as cited in the aforementioned citation. He contested the citation, and MSHA filed the instant proposal for assessment of civil penalty against him.

According to the information furnished by MSHA's counsel during the hearing in this case, Island Creek Coal Company, the operator of the Pocahontas Mine, has paid a civil penalty assessment in the amount of \$240, in satisfaction of the citation (Tr. 4). Counsel also advised that in a proceeding before Commission Judge Gary Melick, Docket VA 83-47, the Judge on or about January 13, 1984, approved a settlement calling for the contractor to pay a civil penalty assessment of \$9,000 in satisfaction of the citation (Tr. 5, 25).

#### Issues

Whether respondent Joseph B. Necessary, acting as an agent of the contractor mine operator, knowingly authorized, ordered, or

carried out the aforesaid violation under section 110(c) of the Act, and, if so, the appropriate civil penalty which should be assessed against him individually pursuant to section 110(a) of the Act.

Additional issues raised by the parties are identified and discussed in the course of these decisions.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
2. Commission Rules, 20 C.F.R. § 2700.1 et seq.
3. Sections 110(a) and 110(c) of the Act. Section 110(a) provides for assessment of civil penalties against mine operators for violations of any mandatory safety or health standards, and section 110(c) provides as follows:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) (emphasis added).

30 C.F.R. § 77.200, provides as follows:

All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

An "agent is defined in Section 3(e) of the Act (30 U.S.C. § 802(e)) to mean "any person charged with responsibility for the operation of all or part of a coal mine or other mine or the supervision of the miners in a coal mine or other mine."

#### Stipulations

The parties stipulated as to jurisdiction, and the fact that the respondent was employed by the independent contractor

in question as a foreman during work performed by the contractor at the mine site in question in June and July 1982. They also agreed that the refuse bin structure in question collapsed on or about August 24, 1982, and that following an MSHA investigation, the respondent was cited for the violation which is the subject of this case (Tr. 6-7).

The parties stipulated as to the authenticity of MSHA's official report of investigation, exhibit P-1, and they agreed that the citation issued by MSHA Inspector Jerry Wiley in this case was the result of the investigation conducted by MSHA (Tr. 7). MSHA's counsel pointed out that the report (exhibit P-1), was issued on August 24, 1982, but that a final report was not released until March 2, 1983, after the citation issued. Counsel explained that the August 24, 1982, "preliminary report," including the date contained therein, formed the basis for the issuance of the citation by Mr. Wiley. Counsel also indicated that Mr. Wiley had no independent knowledge of the facts leading to the collapse, other than the report of investigation, and the parties agreed not to call him as a witness in this proceeding since the author of the report, MSHA Inspector Dale Cavanaugh, would testify (Tr. 9-10).

#### Petitioner's Testimony and Evidence

Ernest M. Cole, Yard Foreman, Island Creek Coal Company, testified that at the time of the accident he was employed at the mine as the Assistant Outside Maintenance Foreman. During the miners' vacation period in 1982, he was responsible for maintenance and repair work at the preparation plant, and he confirmed that he occasionally observed the work being performed on the bin structure in question. He confirmed that he was aware of the fact that the top of the bin had been removed for repairs, and that during the removal process the crane used to lift it off collapsed. He also was aware of the fact that Mr. Necessary was the site foreman for the J W & L company performing the work on the bin (Tr. 33-37).

Mr. Cole stated that he was concerned that the repair work would not be completed by the contractor by the time miners' vacation ended, and he indicated that once the bin was removed and on the ground, work was not progressing during the second week (Tr. 37). Mr. Cole confirmed that the bin stub columns were welded to the structure while it was on the ground, and he indicated that he was aware of no engineers from the contractor or Island Creek reviewing the work being performed by the contractor (Tr. 38).

Mr. Cole stated that once the bin was replaced, he went to the top to make sure that the belt was operable so that

the preparation plant could operate. He did not believe that he had any responsibility to inspect the structural integrity of the work performed by the contractor, and his concern was that the belt at the top of the bin was operational. He confirmed that prior to the repair work, the bin had a large hole in it which caused some spillage of waste materials (Tr. 41).

Mr. Cole identified exhibit P-1 as a copy of MSHA's accident investigation report, and he confirmed that he is the same Mike Cole referred to in the report. He described what he saw when the structure collapsed (Tr. 42-44). He confirmed that any knowledge he had that any of the bin support columns were misaligned came from his reading of MSHA's report (Tr. 45), and he had no prior personal knowledge that the support columns were misaligned (Tr. 46).

On cross-examination, Mr. Cole described the hole in the bin, and he confirmed that spillage was cleaned up with an end loader. He also confirmed that there was a concrete pad at the base of the bin structure, and that it was not muddy, but it would be wet on occasions when the plant was washed down (Tr. 56). He stated that he was not aware of the condition of the bottom half of the bin structure prior to the repair work (Tr. 56-57).

Mr. Cole indicated that the bin was used to store refuse such as rock and slate which had been removed from the coal. He explained the procedures used to process the coal through the preparation plant and into the bin (Tr. 58-60). He also explained that "filter cake," or the finer particles from the refuse, finds itself into the bin, and it is either wet or dry (Tr. 62). He stated that he is not aware of any "proper procedure" for freeing up such material which may "hang in" the bin, and he confirmed that the only way he is aware of for freeing the material is to "beat on" the bin (Tr. 63). When this is done, the material falls through the bottom of the "cone shaped" end of the bin onto a feeder and into a hopper (Tr. 64). He confirmed that "beating on" the bin has been a long standing method for freeing such material from the bin (Tr. 64-65).

Rufus W. Young, welder, J W & L Construction Company, testified that he and Mr. Larry Stewart worked on the bin which is the subject of this case. He described the work performed in removing the top of the bin structure, and he indicated that each of the six stub columns were cut through with a welding torch in order to remove the top of the bin. He indicated that the top of the bin which was removed was cut off above the support columns at the top of the ring which is at the bottom cone portion of the bin. He stated that

the main columns supporting the structure from the ground up to the location where the bin was cut off were large columns which did not continue up to support the top of the structure. The upper support columns were smaller four or five inch columns different from the bottom ones (Tr. 73).

Mr. Young stated that Mr. Necessary was supervising the work he and Mr. Stewart were performing. He also confirmed that this was the first time he had ever taken a top off a bin structure and replaced it after repairs, and he indicated that in his past experience the entire bin structure was simply replaced. The job for Island Creek was the first time he had ever taken off the top of a bin above the funnel. He confirmed that the new portion of the bin which he worked on had been prefabricated in two pieces, and that he and Mr. Stewart simply welded them together while it was on the ground. They also added the stub columns which had been cut off the old bin. Mr. Young was not present when the old bin was lifted off and lowered to the ground (Tr. 74-76).

Mr. Young explained how the six stub columns were welded to the bin structure while it was on the ground, and he indicated that measurements and "plumbing" were done to insure that they were on straight. This work was finished late in the second week of the vacation period. Once the columns were on, the crane lifted the bin in place on top of the structure, and once one of the columns was aligned, he and Mr. Stewart began the welding process from inside the bin, working their way around. He described the process as follows (Tr. 79-82):

Q. When you put that bin in place with six columns, you assumed that the other five were in line because this one was in line?

A. Yes, I would say that's what we done because there was no way of setting it and telling because it wasn't a perfect circle. We had to draw it in in places. In some places it would stick out, and in some places it would be on the inside.

Q. It did not quite fit; did it?

A. No, not perfect. I have never put anything together like that that did [sic].

Q. I am sorry, I didn't get your last answer.

JUDGE KOUTRAS: He said he has never known one to fit in perfect. He tried to align it the best he could.

Is that what you said?

A. Yes, sir.

Q. How was the new bin marked for the columns to be put on? This is when it was down on the ground.

A. We just got the center of one column and started with it and marked the rest of them as we went around, mark the centers.

Q. Was the mark put on the bin for the center of the column or the edge of the column?

A. Well, we got the center of the column and then we measured the thickness of the beam and marked the edges so we could see. If it had been the center, you wouldn't have able to put it on there right, so we marked it for the edges of the beams.

Q. When you set the new bin on top of the old columns, you only lined up one column?

A. Well, that's all we could line up at the time.

Q. After it was put in place, lined up on that one column, did the crane disconnect from the bin and you started your welding process?

A. No, sir. We left the crane hooked to it until we worked it around and got it all the way around.

Q. The crane was in place holding the bin while you did the welding around the structure?

A. On the inside.

Q. On the inside?

A. Yes, sir.

Q. So you got inside the bin and you welded a circle around the bin where it joined with the cone?

A. Yes, sir.

Q. At that point you had not done anything with welding the columns; right?

A. No, sir.

Q. So the inside was fully beaded?

A. Yes, sir.

Q. Did the crane go away then after you finished that?

A. To the best of my recollection it did.

Q. Is this one of the long days that you worked?

A. That we welded?

Q. Yes.

A. Yes, sir.

Q. Putting the bin in place.

A. Yes, sir.

Q. Is that the day you worked about 20 hours?

A. Probably so.

Q. You welded the whole inside?

A. Yes.

Q. Did you start welding the outside that day?

A. No, sir.

Q. You went home when you finished on the inside?

A. Yes, sir, we went home when we got the inside made up and the belt put back on top and they started running rock through. They started it up. We did the work on the outside while they was running.

Q. So the actual welding of the stub columns took place --

A. While they was running rock in the bin.

Q. After miners' vacation?

A. Yes.

Mr. Young explained the work which was performed on the outside of the bin once the inside work was done, and his testimony is as follows (Tr. 83).

Q. You did another weld on the outside of the bin all the way around?

A. Yes.

Q. How did you match up the columns, the stub columns?

A. They were matched when they come around, all except one was a couple inches off. One of the two bins weren't the same size. When we drew it around it was a slight bit larger, so it threw one of the columns off a couple of inches, to the best of my remembrance.

Q. Did you bring that to Mr. Necessary's attention?

A. Yes, sir, later in that week we did.

Q. Did you do the welding of that column before he knew about it?

A. I don't recall. I am not sure.

Mr. Young was shown a copy of a signed statement he gave to MSHA's special investigator on July 9, 1984, and he acknowledged that it is his statement (Tr. 84; exhibit P-2). A portion of the statement was read into the record, as follows below, and Mr. Young acknowledged that it was true (Tr. 85-86):

We started welding on the top part of the bin and when we got all the way around to the last column, I, the other welder, Stewart and Gillespie and the foreman Joe Necessary noticed the top H-beam was off center about two inches.

Mr. Young explained that he noticed the columns were out of line the week after the vacation period ended, and he explained further as follows (Tr. 86-89):

Q. What I am trying to understand is when did you first notice that they were out of line? The week after the vacation was over?

A. While we was working on the outsides of the bin, we noticed a bludge inside the bin.

Q. In other words, by the time the miners' vacation was over this job had not been completed yet; is that right? You were still working on it, the miners were back and they were running material up this belt?

A. Yes, they were running material up the belt while we were working.

Q. You were working doing what around the outside of it?

A. Welding around the outside.

Q. Welding what?

A. Welding the top part of the beam to the support ring and the column.

Q. What was holding this bin up while they was dumping?

MR. FITCH: Interweld.

THE WITNESS: We made a complete weld on the inside all the way around. They started up, and we went on the outside and started to work on the outside of the bin.

BY JUDGE KOUTRAS:

Q. It was when you were doing this work on the outside to finish this job is when you saw that one of the H-beams --

A. Yes, sir, that's when we were out there. That's the only time we were in a position to see it.

Q. That is the first time you noticed it?

A. Yes, sir.

Q. How does it come to pass that Mr. Stewart and Mr. Gillespie and Mr. Necessary were all there and noticed it too?

A. We were just working there and we talked about it, we noticed it --

Q. About two inches?

Q. One column?

A. To the best of my memory, one column about two inches.

Q. Then the statement goes on to say: "We discussed the condition with Necessary and he told us to put a plate to help support the bin. We put the plate on after they had already started putting rock in the bin. Necessary was the only one I saw" -- What is that next word?

MR. FITCH: Inspect.

BY JUDGE KOUTRAS:

Q. "Inspect the bin after the work was completed." So after you noticed that it was two inches off, this one column, what is this business about a plate?

Q. Well, we would have had to put a plate in anyway because where we burnt we had to straighten it up. There would have been a gap between the two beams. We would have had to put the plate in there anyway.

Q. What you said in this statement to the man who took it from you on July 9th, is as you remember it back when you finished the job; is that correct?

A. Yes.

Mr. Young explained how he welded half-inch plates under the column which was two inches off center, and he referred to Drawing 4, which appears at page 12 of MSHA's accident report to explain how the plates were welded to the column. He also testified as to certain "scrapes" which appear on the pictures shown on page 13 of the report, as well as the seams and bolt holes which appear in the photographs (Tr. 98-100). Mr. Young could not recall whether plates were welded on all six support columns, "or just the ones that had the gap in it where we couldn't weld it" (Tr. 102). However, he conceded that "it was possible" that more than one plate was welded on (Tr. 104).

Mr. Young stated that to the best of his recollection only one of the stub columns was off two inches, and since it was already welded onto the bin, there was nothing that could have been done to move it over (Tr. 109). The column was left in that position when the plates were welded on (Tr. 117). The plates simply filled the gap under the column, and had nothing to do with it being two inches off center (Tr. 118).

Mr. Young stated that during the course of his welding work on the bin structure, he did not do any bolting work, and he reiterated that at no time were any of the stub columns off center by eight inches (Tr. 126). He conceded that when the repair work was completed, the one column was still two inches off center (Tr. 126).

On cross-examination, Mr. Young stated that at no time during his work on the bin structure was he ever rushed or pushed to work faster, and he believed he had adequate time to do the work as he believed he should do it (Tr. 128). He stated that during the time he was performing work on the structure, some of the concrete footers at the base of the structure were under water. He also indicated that he did not notice whether all of the "X" cross or lateral support beams at the base of the structure were in place (Tr. 129).

Larry S. Stewart, testified that he is employed by J W & L Construction Company as a welder, and he confirmed that he participated in the repairs made to the bin in question in this case. He confirmed that he welded the old stubs which had been taken off the old bin to the new bin while it was on the ground. He stated that he and Mr. Young measured the old beams while the bin was on the ground, and that Mr. Necessary was present and observed how these measurements were made. He described how this was done and confirmed that once the columns were welded to the new bin, he helped install it to the structure and helped "line it up" (Tr. 131-133). He described what he did as follows (Tr. 135-145):

A. Well, we was -- a couple of us like was on one side and maybe two or three on the other side and we sort of tried to get them all lined as we set it down. Then we started at that one and got it real close and as best, you know, in line and then worked our way around, drew the bin in, because part of it would be bulged out a little bit because where you welded it it would give a little.

Q. It was not a precise fit when you put it back?

A. No.

Q. As you welded it it bulged around?

A. What I was talking about is when they put the stub columns on the ground it might have drawn in a little bit. That is the reason we had to pull it on in to make it fit.

\* \* \* \*

Q. When you say "draw it in," can you explain what you mean by draw it in.

A. We had had a ring, you know the ring, part of it was sticking over just a little bit so we had to make something to put on it and then tack it and draw it in so it would fit flush and worked our way around.

Q. So the bin was too big, but not by much or what? I am trying to understand what you are trying to tell me and I am not quite clear. It wasn't a simple easy bead around. You had to make it fit?

A. Yes, had to sort of -- you had to draw it in.

Q. What kind of equipment did you use to draw it in?

A. We had some big 12-inch C-clamps. You know, you could draw the metal down. We cut part of it off and made a foot and put it at the bottom and we tied to the part that was like this, out, and then drew it, you know, just kept screwing. We had like three or four drawing it into a fit and then we would tack it, then we would go back and weld.

Q. When you finished that process, how many of the outside stub columns had been welded to the other columns; do you know?

A. I know one had for sure.

Q. How many did you actually weld?

A. I can't remember. Maybe two or three. I don't remember if I welded all' of them.

Q. Do you remember coming across a stub column that was not lined up with the column above it?

A. Yes, that was two or three days after we had done put it up. They was running refuse in the bin.

Q. Tell me what happened that day; what did you see?

A. It wasn't directly over top of it. I thought it was -- by looking, you know, I thought it was like a couple inches off.

Q. Did you talk to anybody about that?

A. I didn't, no.

Q. Who did?

A. Mostly I worked with Rufus. He usually talked to Joe and then he would tell us everything to do.

Q. That was Joe Necessary and Rufus Young?

A. Right.

Q. Mr. Necessary would tell you what to do -- or he would tell --

A. Mr. Young would tell us, you know, what we would be doing, you know.

Q. Did you do the welding for the column that you say did not line up?

A. I don't remember. I can't remember.

Q. You do not remember putting a plate in and --

A. Yes, I remember we put plates in. We put the plates in. I am not for sure -- we was in a basket when we was putting them back.

\* \* \* \*

Q. I have told you and you have heard in the testimony today the investigation indicated with respect to Drawing Number 3 that Columns Number 4 and 5 were offset 8-1/2 and 8 inches, respectively, and that is a drawing to give a representation of how the stub column did not align directly with the main column.

A. They didn't line up, but to the best of my knowledge, I don't think it was off no eight inches. Which when they came and talked to me a year ago, the first time, they only said one

column. Now you all say there was two. I told them then that I thought it was just off like a couple inches. I didn't think this drawing was right.

Q. Well does that drawing look like the work you did?

A. Yes, we put plates in here. We did put plates.

Q. And you beaded those plates to the lower column and you beaded them to the stub column and you beaded them to the bin?

A. We welded all the way around this ring, see. This is a separate one. There were two going to the top of that. See, because when I cut it loose, there was one coming up that stopped here, and there was an old plate in there to start with, then that stub column set on it.

See, this ring, it wasn't one solid made ring. It came on both sides of this main support beam. Then there was a plate. I know some of them was over top of it.

Q. The stub column was welded to the plate?

A. Welded to the plate and that is the way we welded them back. The reason we had -- some of them had like a thicker gap -- some of the beams was more cut out when it was taken down -- Well, I cut most of them out and then some of them I went back and cut again because like one of them come loose. That is the reason why we had a couple plates in some of them.

\* \* \* \*

Q. Is that diagram and the previous diagram, which is Page 11, Drawing Number 3 that shows the offset and in Drawing Number 2 on Page 10 which shows how it should have been -- Do you recall welding those two stub columns, Column 4 and Column 5, at an offset without having the beam directly centered on the stub column?

A. I can remember welding on them, yes. I know of one being off, but I don't think it was off no eight inches.

Q. You never measured it; did you?

A. No, I didn't measure but I could almost tell by looking it wasn't no eight inches. I would call it about two inches or two and a half. Eight inches would be that (indicating).

Q. Do you recall that that occurred on one or two columns?

A. I just recall it on just one, to the best of my knowledge.

Q. You indicated that you and Mr. Young were the people that did the welding on the outside and you were hanging in a basket doing this work; right?

A. Yes, -part of it you could get out and walk. We had a scaffold built you know, on the outside. Part of it we got on the platform and welded and part of it we got in the basket and worked around.

Q. Mr. Stewart, are you aware of whether or not Mr. Necessary saw that column that you maintain was misaligned?

A. He came out while we was working on it, you know, and was talking to us and telling us what to do -- like I say, mostly he talked to Rufus, like, you know, tell him what to do. But I am almost sure that he saw it off.

Q. Did he get in the basket? Was he on the scaffold?

A. You could come up the bin, you could climb down, you could go walk around it. You know, you could go around it.

Q. On the scaffold?

A. Yes.

Q. You saw him in the presence of that one column that you recall?

A. I believe, I can't really swear to it, you know, that positively that I know he saw it.

Q. Did you receive any instructions from Mr. Young or Mr. Necessary as to how to weld the column that you recall was not aligned?

A. We were told, you know, to put our plates in there to bridge that gap, which like I told the guy when he came and talked to me that you would have had to fill that gap and you would have had to put a plate in there.

On cross-examination, Mr. Stewart stated that the reason the new bin was "slightly off" when it was replaced was that the entire bin and cone were not replaced. He indicated that the cone was "eat up," and he believed it should have been replaced. He described how the old bin top was cut off the structure, and he indicated that the newly repaired portion of the bin was welded to the cone on the inside. He also indicated that the old bin cone ring had been "riveted on" and "stitched on," and that the rivets are similar to bolts spaced a foot apart. He also indicated that the ring was not a solid weld where it fit to the cone, and that the rivets make holes in the side of the bin (Tr. 145-150).

Mr. Stewart stated that he did not feel "rushed" during the time he worked on the bin, and he confirmed that some of the structure concrete footers were under water (Tr. 155). He also indicated that the structure had X-braces and lateral supports, and he could not recall whether any of them were missing (Tr. 156). He was not present when the structure collapsed (Tr. 157).

In response to questions from the bench, Mr. Stewart testified as follows (Tr. 158-165):

Q. When you welded the new bin onto the pressure ring, the idea is to get the stub column directly over the existing I-beam that is under it; right, so that one will support the other; is that right?

A. Yes.

Q. To the best of your knowledge, did you achieve that objective, did you get all that lined up to where you thought it should be lined up?

A. No, we didn't -- there was one like I --

Q. The one that was two inches off?

A. I think it was about two.

\* \* \* \*

Q. How many of the stub columns had you welded? I understand you put the first one in, but how many had you welded after you came back after the Sunday and they were operating and they were pouring material into that bin; do you recall?

A. At least four. Well, I know positively we welded one on Sunday, the one we started from.

Q. Did you ever perform any welding work from the scaffold while they were pouring material into that bin?

A. Yes.

Q. Did that concern you at all?

A. It was no problem to me.

Q. I see this scenerio, you and some of your fellow working welders up there on the scaffolding and only one column is in place and you are in the process of welding the rest of them and they are pouring all this material in the bin; weren't you concerned that the outside support columns, stub columns, were not in place yet?

A. After we welded up on the inside, they was pretty well in line then. They was over the top of the other one and the bin was set in the tank. Well, I say the tank, it was on the ring real -- setting on it good and I didn't think it was going to come off.

Q. Now, the theory of the Government's case here is after you fellows completed your job, there were two columns that were off eight inches and within a week or two after you finished --

MR. FITCH: Five weeks.

BY JUDGE KOUTRAS:

Q. -- five weeks after you finished something happened to cause this thing to collapse. My curiosity is aroused as to if it took five weeks for it to collapse after all the stub

columns were in place, why did it not collapse when only one was in place and you fellows were working on it and they were pouring material into it? Do you have any explanation for that or any opinion or anything?

A. Well, that's what I thought, it looks like -- with those columns we didn't even have welded, it looks like it would give then. The way I feel about it, I think they got it too full and all that weight come down. I believe that cone come loose from the bottom it tore loose from that ring and it shoved out. I thought about it before, you know, like if that cone give out because, see, they didn't replace that cone. It was eat up and you had all that weight coming down in that thing. I either feel that one of them bottom main support beams either gave down then it peeled off, it would have to peel off, or either that cone come out from under the bottom.

\* \* \* \*

A. I believe the bottom gave down and it turned over. I thought that they should have replaced that bottom part. The coal company I thought Island Creek should have replaced the whole thing.

Q. Aside from that, the Government's theory here seems to be that the thing gave way because two beams were misaligned. Be that as it may. You were not concerned when you were up there and they were dumping all that stuff.

A. I didn't think it would -- what we would have done would have give away, no. But I thought about that bottom part coming out, which I talked about, you know, to Mr. Young.

Q. Who is Mr. Young?

A. Rufus Young, the one that was working with me. I told him that bottom -- I thought it might shuck out if it got full.

Q. When was that? When did you talk to him about that?

A. When he was working, doing the job.

Q. Did you mention that to anybody else?

A. I mentioned it to -- not until after it fell.

Q. Who did you mention it to after it fell?

A. The investigators when they came about a year or so -- I didn't even know anybody had got killed.

\* \* \* \*

Q. Had you ever done any of this kind of work before?

A. Yes, I have.

Q. Cutting the top off of a bin like this?

A. Yes, I have welded up water tanks we have set them up, I have welded lugs on, we have picked them up with a crane and set them and welded all kinds of belt structures, stock piled coal.

Q. So what you are saying, if you had to do this all over again if you were the man that wrote the work order, you would have taken the whole contraption down and put a new one up there; is that right, rather than cutting it off?

A. Yes, I would. I would have replaced that cone and all. I asked the inspectors about that water hole. I was wondering if they might have put -- there's a settling pond there. I was wondering if it was put in after that bin. I thought maybe they might have put it in after it and undermined one of those footers, too. That run in my mind, if maybe one of them gave down and come over.

Dale R. Cavanaugh, Mechanical Engineer, MSHA Coal Mine Safety Division, Arlington, Virginia, testified as to his background and experience. He identified exhibit P-1, as the report of investigation which he and others published after the completion of the accident investigation in question. He stated that upon inspection of the storage bin parts which had been inventoried and marked by the respondents personnel, it was concluded that the bin columns had been misaligned, and the conclusion reached by MSHA in this regard was the result of the examination of these parts (Tr. 166-169). He

confirmed that all of the bin stub columns were still attached to the bin sides, and that the cone section was attached to the insides on all locations that were used to determine what caused the bin to collapse. He also confirmed that measurements were made to support the conclusion that the stub columns shown in photographic exhibits C-4 and C-5 were misaligned, and he described how this was done (Tr. 170).

Mr. Cavanaugh stated that there was no doubt that two of the stub columns were misaligned by eight or eight and a half inches, and he explained how he made this determination, including a review of the blueprints of the structure supplied by the company who originally designed, manufactured, and installed the bin sometime in 1968, and interviews with representatives of that company (Tr. 171-172). Mr. Cavanaugh also explained how the misaligned columns affected the bin load capacity and weight distribution (Tr. 173-174).

Mr. Cavanaugh stated that his investigation did consider the possibility that the bin footings and the complete failure of the cone may have contributed to the collapse of the bin, but that these theories were discounted, and the cone was still attached to the bin sides on most of the pieces which were examined (Tr. 175-176). He also indicated that his engineering calculations, which were based on the misaligned columns, indicated that the structure could not support a fully loaded bin (Tr. 176). He believed that a reasonably prudent person would have insured that the misaligned columns were removed and reattached to the bottom columns so as to transfer the weight load to the support column, and that the failure to take this corrective action caused the collapse of the structure (Tr. 177).

Mr. Cavanaugh confirmed that MSHA's investigation determined that the crane accident did not affect the stability of the structure, and he concluded that anyone with knowledge of the way the bin was supported, and the fact that the columns were misaligned, should have known that "something was wrong" (Tr. 179).

On cross-examination, Mr. Cavanaugh confirmed that he is a trained mechanical engineer rather than a civil engineer. He conceded that it was possible that the original installation of the structure may not have been exactly how it is depicted in the blueprints which he examined (Tr. 187). He confirmed that his investigation did not disclose that any alterations were made to the structure after it was constructed (Tr. 188). He explained the function of the bin bolt holes as follows (Tr. 188-191):

A. There were bolts going through the column through the bin side pieces that would align those segments during construction so welding could be done. The bolts were through those holes and through the column when it was built and the way the one in VP-2 is built also, which there is a picture of it.

Q. What did you take the purpose of those bolt holes?

A. I felt that they were to help support the bin in place while the welding was to be done and also to keep the column close to the side of the bin to help facilitate welding.

Q. Did you inspect for bolt holes or, I guess they could be rivet holes as well, underneath or in the area of the four stub columns other than the two that you decided were misaligned?

A. Yes, we did.

Q. What did you find in regard to those holes?

A. They were aligned. They were aligned with the stub column as in the top picture.

Q. Would bolting the bin to the main support column be the only way of securing the bin to the main support column?

A. I am not sure what you mean.

Q. Could the bin be welded to the main support column as well as bolted?

MR. FITCH: Point of clarification. His testimony was it was welded after the bolts were put in.

THE WITNESS: The weld was holding the bin, not the bolts. Of course, the bolts would help it. They are not near strong enough to hold that bin up.

BY MR. TALTY:

Q. It was primarily the weld?

A. Right.

Q. Would it be possible that when the structure was originally erected that there was a slight misalignment at that time such that the bolt holes in the bin did not line up with the bolt holes in the main support column so that they were not used, that they were simply a weld put in but no bolt?

A. I looked at the support column in all six. Unless that column was cut where it had originally been cut, in other words, the cut was in an identical place, there was no other cut welds on either piece, the stub column or the main support column. So, if that had happened, then they had cut the stub column off in the exact place that it had been cut before.

Q. I am not sure I follow your answer. It may have been a good answer, but it was not clear to me. Is there any reason to think that one or more of those pairs of bolt holes were not used, that they were just simply holes in the side of the bin?

A. No, we didn't find any evidence whatsoever to support that.

Q. I am not asking if you found evidence to support that, I am asking you if it could have been. Was it possible? Do you have evidence that every bolt hole lined up with a main support column, physical evidence?

A. The last time the bin was painted there was a support column lining up those holes because right below those holes they needed paint. Sir, that is about as much evidence as I have.

Mr. Cavanaugh also indicated that contrary to the blueprints, which indicated continuous support columns from the bottom of the structure to the top, the investigation revealed that the support columns were cut and that plates were inserted to form the stub column (Tr. 192-197). He confirmed that transit checks were made on the footings, and that there was no way to determine how many cross braces may have been

present prior to the accident. He conceded that to some extent, the removal of lateral and cross supports would affect the structural stability and strength of the bin structure, and that it was possible that there could have been a failure of a leg (Tr. 201).

In response to further questions, Mr. Cavanaugh stated that the load capacity of the bin was 300 tons, and he estimated that at the time of the collapse there was approximately 250 tons of material in the bin (Tr. 205). He confirmed that his mathematical calculations took into account the two support beams misaligned by inches, and a load by 300 tons. He confirmed that while welds were made on the two support columns in question, the top support columns were not directly over the bottom ones (Tr. 206). He concluded that the structure did not collapse earlier than it did because it was strong enough to support 250 tons, and the work which was done on the welds was "good work." However, he believed that the material breaking loose inside the cone initiated the collapse (Tr. 207, 209). In his opinion, the bin was close to collapse when one of the victims began banging on the cone with a sledgehammer to free the clogged materials, and that the falling material "probably" initiated the collapse (Tr. 210).

Mr. Cavanaugh stated that in his opinion, even if the bin structure had not collapsed, it was still not maintained in good repair in compliance with mandatory safety standard section 77.200 (Tr. 216-217).

#### Respondent's Testimony and Evidence

Joseph B. Necessary, testified that he is 61 years of age, and he confirmed that he has been in mine construction work, including work as a welder, for approximately 45 years. He testified as to his experience and background, including the operation of his own mine construction business (Tr. 241-245).

Mr. Necessary stated that since August 1982, he has been employed for approximately four weeks, and that since that time he has done odd jobs such as "carpenter work, pouring concrete" (Tr. 245). He described his present financial condition as "Low. From one day to the next," and he indicated that his financial obligations include mortgage and car payments, and utility costs. He also indicated that he has had to rely on his son for financial assistance (Tr. 246).

Mr. Necessary confirmed that he was in charge of the dismantling of the top of the bin in question, as well as

the repairs that were made to that structure. He described how the work was performed and how the old bin was cut off and removed, and how it was replaced after the welding work was completed (Tr. 247-253). He also described the procedures used to cut the old bin portion away from the structure, including the cutting of the stub columns in question (Tr. 254-258).

Mr. Necessary described that the loading of refuse into the bin began after the interior welds were completed, but before the outside work had been completed (Tr. 261). He confirmed that Mr. Young and Mr. Stewart did the work connected with the welding of the stub columns, and he confirmed that he was called up to look at the work, and that he was informed of the fact that one of the columns was "out of line" for a distance of two inches, and that he confirmed this by measuring it with a tape (Tr. 262-263). He denied that any of the stub columns were misaligned by eight inches or more (Tr. 265).

Mr. Necessary testified that he observed water around the bin structure footers at the No. 5 and 6 columns next to the catwalk (Tr. 269). He conceded that the newly repaired bin may have been "out of round" when it was reinstalled, and that it was "drawn in" to correct this problem, and he indicated that the new bin was of the correct size (Tr. 271).

Mr. Necessary expressed an opinion that the collapse of the structure in question was caused by the "bridging of material," which entailed the filling of the bottom of the bin cone with "filter cake" material, and he explained his theory as to what may have caused the collapse of the structure (Tr. 271-275).

On cross-examination, Mr. Necessary confirmed that upon examination of the repair work, he observed only one column which had been welded on two inches off center (Tr. 278). When asked about the bolt holes which are present under the columns depicted in MSHA's report at location C-4, Mr. Necessary stated that he could not recall observing any bolt holes at the time the work was performed (Tr. 282). He confirmed that at no time did he ever view the bin after it collapsed, and that he has never spoken with anyone who worked around the bin when it collapsed (Tr. 284).

Mr. Necessary stated that at the time the repair work was performed, he looked at the bin and found that five of the stub columns were aligned properly, but that one was misaligned by two inches (Tr. 288-289). He could not recall

discussing the matter with Mr. Young or Mr. Stewart, and he indicated that he did not consider it "that much of a hazard" (Tr. 293). He also did not dispute Mr. Cavanaugh's testimony that the holes in the columns were used to align them, but he indicated that he had no knowledge of any such holes and has never heard of them being used for that purpose (Tr. 295-296).

Inspector Cavanaugh was recalled for additional testimony, and he indicated that "impact loads" caused by a "pyramiding" and sudden falling of filter cake materials in a bin cone are common occurrences. He pointed out that the bins are specifically designed to withstand such loads, and he concluded that there has to be something wrong with a structure of this kind to allow it to collapse (Tr. 315). He reiterated that it was his opinion that the collapse of the bin in question was caused by the misaligned stub columns, and that his opinion that the columns were misaligned by as much as eight inches was based on his examination of the physical evidence which remained after the collapse, and the fact that two placement holes were off center (Tr. 315-316).

#### Procedural Motion

At the conclusion of the petitioner's case, respondent's counsel made a motion to dismiss the proposal for assessment of civil penalty filed against Mr. Necessary on the ground that petitioner presented no evidence to support its assertion that he had any knowledge that two bin columns were misaligned by eight inches. Conceding that the evidence presented by petitioner may establish that Mr. Necessary was aware of the fact that one column was misaligned by two inches, and conceding further that petitioner's evidence and testimony may support a conclusion that the bin was not in good repair, and therefore in violation of section 77.200, respondent's counsel asserted that there is no evidence to support a "knowing" violation against Mr. Necessary (Tr. 227-228).

Petitioner's counsel argued in opposition to the motion to dismiss, and in support of his case asserted that the evidence presented by the testimony of the two welders and Mr. Cavanaugh show without a doubt that two of the columns were misaligned, that this caused the structure to collapse, and that as the on-site foreman, Mr. Necessary should have known that the structure was unsound (Tr. 227-239).

After further consideration of the oral arguments in support of and in opposition to the motion to dismiss, it was denied (Tr. 240).

## Findings and Conclusions

The interpretation and application of the term "knowingly" as used in the Act has been the subject of litigation before this Commission. MSHA v. Everett Propst and Robert Stemple, 3 FMSHRC 304 (1981). In MSHA v. Kenny Richardson, 1 FMSHRC 874 (July 1979; ALJ Michels), 3 FMSHRC 8 (January 1981), the Commission held that the term "knowingly" means "knowing or having reason to know," and it rejected the assertion that the term requires a showing of actual knowledge and willfulness to violate a mandatory standard. In this regard, the Commission adopted the following test as set forth in U.S. v. Sweet Briar, Inc., 92 F. Supp. 777 (D.S.C. 1950):

'[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

In Richardson, the Commission held that its interpretation of the term "knowingly" was consistent with both the statutory language and the remedial intent of the Act, and it expressly stated that "if a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." On appeal to the Sixth Circuit, the Court affirmed the Commission's decision, Richardson v. Secretary of Labor, FMSHRC, 689 F.2d 623 (6th Cir. 1982), cert denied, 77 L. Ed. 2d (1983).

In MSHA v. Roy Glenn, 6 FMSHRC 1583 (July 1984), the Commission applied its holding in the Richardson case to a factual situation where the violation of a mandatory standard did not exist at the time of the alleged failure of the corporate agent to act. The Commission stated as follows at 6 FMSHRC 1586:

\* \* \* we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly" in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that

a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the structures of the Mine Act.

Given the parameters of the Commission's application of the term "knowingly" in the Richardson case, and the refinement of that term in the Glenn case, the question presented is whether, given the facts presented in this case, Mr. Necessary "knew or had reason to know" of the violative conditions, but failed to act. In this regard, the commission observed as follows in its Glenn decision, at 6 FMSHRC 1587:

\* \* \* the Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance. Our decision here today is buttressed by the same concerns and principles.

Although the respondent in this case conceded that MSHA's evidence establishes that the existence of one or more misaligned support columns may support a conclusion that the bin structure was not in good repair as required by the cited mandatory section 77.200, it nonetheless attempted to establish that other circumstances may have caused the collapse of the structure. Respondent's testimony is that the existence of standing water at the base of the structure at the footings, and the possible lack of enough cross-braces at the base of the structure may have precipitated the collapse. However, upon review of the testimony, I conclude that respondent's assertions in this regard fail to rise above unsupported opinions and speculations. On the other hand, Mr. Cavanaugh testified that he considered these factors in his analysis and determination of what caused the collapse, and discounted them. I accept Mr. Cavanaugh's explanations as credible, and I conclude and find that respondent has not established that the standing water or any missing braces caused the structure to collapse, or otherwise contributed to that incident.

During the hearing, the respondent raised the inference that the structure may have been damaged when it was struck by a crane while lifting the bin from the top of the structure. However, the testimony establishes that it was the respondent's crane, and that examination of the bin structure at the time of that event did not detect any damage. Accordingly, respondent's assertion is totally unsupported, and it is rejected.

Although Mr. Necessary was of the opinion that the collapse of the structure was caused by material "bridging" in the cone portion of the bin, and then suddenly being loosened, Mr. Cavanaugh discounted this theory and testified that such "bridging" is not an unusual occurrence and that a properly constructed bin should withstand such sudden releases of materials.

Finally, the respondent argued that because of the complete collapse and massive accumulation of bits and pieces of the structure after it collapsed, it is impossible to reconstruct the incident with any degree of certainty. In this regard, I take note of the fact that the respondent failed to call any engineering or construction experts to support its conclusions in this regard. On the other hand, MSHA presented the testimony of Mr. Cavanaugh, a mechanical engineer who participated in the post-accident investigation, and who was in large measure responsible for authoring the August 24, 1982, report which is part of the record in this case (exhibit P-1). Further, the record establishes that after the collapse of the structure, all of the remaining parts were secured, inventoried, and labeled by the mine operator, and MSHA's reconstruction of the event, including its conclusions as to what caused the collapse of the structure, was made after careful analysis and evaluation of all of this material. Accordingly, after careful review of Mr. Cavanaugh's testimony, I conclude and find that the petitioner has established by a preponderance of all of the credible evidence adduced in this case that the proximate cause of the collapse of the structure was the fact that two of the stub support columns were not aligned with the main support columns, and that this misalignment affected the structural integrity of the bin structure in that it reduced its load supporting capability.

The thrust of petitioner's case is that MSHA's investigation of the accident established that two of the bin support stub columns which were replaced after the welding work completed by the welders under Mr. Necessary's direct supervision were misaligned and were not welded in place directly over the structure's main support columns. Petitioner asserts that MSHA's post-accident investigation established that the two stub columns in question were out of line by as much as eight inches, and because of this, the bin structure was structurally unsound, and the misalignment ultimately caused the structure to collapse.

During the hearing, petitioner's counsel pointed out that Mr. Necessary was in a position where he should have known that at least two of the stub columns were misaligned,

that one of the welders gave him an opportunity to observe it closely, and that Mr. Necessary clearly remembered that at least one of the support columns was misaligned by at least two inches, and that he personally made the measurement that confirmed this fact (Tr. 322).

Mr. Necessary admitted that after the construction work was completed on the bin, it may have been "out of round" when it was rewelded to the bin structure, and that this necessitated that it be "drawn in" by the welders. It seems obvious to me that at this point in time, Mr. Necessary should have been aware of the fact that the newly constructed and installed bin did not exactly fit in place when the welders commenced their work of reattaching it. Further, Mr. Necessary admitted that when he examined the work done by the welders, he recognized the fact that at least one of the stub columns had been welded in place two inches off center, and he conceded that the stub support column which he observed was misaligned by at least two inches. Although he testified that he did not consider this misalignment to pose "that much of a hazard," this candid admission on his part supports a conclusion that he at least recognized that the misalignment did in fact pose a hazard.

While there is a dispute in the testimony on the question of whether or not two stub columns were misaligned by as much as eight inches, I cannot conclude that this detracts from the fact that the testimony of at least four witnesses who were either directly involved in the construction of the bin, or participated in the post accident investigation, establishes that one or more support stub columns were misaligned.

I conclude and find that the petitioner has established through the credible testimony of Mr. Cavanaugh, that any misalignment in the support columns affected the structural integrity of the bin structure, thereby causing, or significantly contributing to, its collapse. Under the circumstances, I conclude and find that the petitioner has established by a preponderance of the evidence adduced in this case, that the bin structure in question was not maintained in good repair to prevent accidents and injuries, and that this constitutes a violation of section 77.200.

With regard to the evidence establishing Mr. Necessary's accountability for the violation, Mr. Young, one of the welders who helped do the work, admitted that while he was welding the outside of the bin at a time when material was being dumped into it, he observed one column which was misaligned by at

least two inches, and that it was not lined up with the support column. Mr. Young confirmed the accuracy of a prior statement he made to an MSHA investigator where he confirmed that the misaligned stub column was discussed with Mr. Necessary, and that Mr. Necessary inspected the work.

Mr. Stewart, the second welder who was working with Mr. Young, also confirmed that two or three days after the bin was in place on the structure, and while material was "being run" into the bin, he observed one stub column misaligned by two inches, and he indicated that it was not directly over the companion support column. Further, when asked about the number four and five columns which petitioner claims were misaligned by 8 inches, Mr. Stewart responded that while "they didn't line up," he disputed the fact that they were misaligned by 8 inches, and his recollection was that only one column was misaligned. He also stated that he was sure that Mr. Necessary saw the one misaligned column while he was on an outside scaffold instructing him and Mr. Young as to how to weld some plates to fill gaps under the column.

The evidence adduced in this case establishes that Mr. Necessary was an experienced welder and construction man. He alluded to 45 years of experience in the business, including the operation of his own construction company. Given this background, I believe one can reasonably conclude that he knew or should have known that the misaligned stub support column in question posed a serious potential safety problem which he should have addressed immediately by ordering his welding crew to make the necessary corrections.

I conclude that the facts presented in this case establish that Mr. Necessary was aware of the fact that one, and possibly two, support stub columns had been welded in place in a misaligned position, and not directly above the remaining support column or columns. Further, in view of the fact that Mr. Necessary was supervising the work, the fact that the condition was called to his attention by at least one of the welders, and the fact that he readily admitted he knew that at least one of the columns was misaligned, I conclude that he knew, or with the exercise of reasonable diligence, should have known of the hazardous condition presented by the misalignment of the stub columns in question. Given these facts, I further conclude and find that Mr. Necessary should have taken the necessary corrective action to insure that the stub columns were properly aligned, and that his failure to do so constituted a knowing violation of the cited mandatory safety standard in issue in this case.

## Civil Penalty Assessment

Although given ample time to file post-hearing briefs, or proposed findings and conclusions, the parties declined to do so. However, I have considered the oral arguments made by counsel during the course of the hearing in this matter. With regard to the six statutory civil penalty criteria found in section 110(i) of the Act, petitioner's counsel agreed that the factors of gravity, negligence, and the respondent's financial ability to pay a civil penalty for the violation in question are relevant, but that the factors concerning any history of prior violations, size of operation, and good faith abatement do not lend themselves for application in this case (Tr. 320-321).

### Negligence

I find no circumstances presented in this case which may mitigate Mr. Necessary's negligence with respect to the violation. The evidence establishes that he knew or should have known of the conditions constituting a violation of section 77.200, and that this constitutes a high degree of negligence on his part.

### Gravity

The collapse of the bin structure resulted in the death of three miners, and I conclude that the violation was extremely serious.

### Respondent's Ability to Pay a Civil Penalty

As previously noted, respondent's employer paid a civil penalty in the amount of \$9,000, for a violation of section 77.200, and the mine operator paid a civil penalty assessment in the amount of \$240.

Mr. Necessary's un rebutted testimony is that since August 1982, he has been employed for about four weeks, and he alluded to certain financial obligations which he has, including mortgage and utility payments. He also indicated that he has had to rely on his son for financial assistance.

Petitioner has asked for a civil penalty assessment in the amount of \$1,000, and its counsel suggested that if this amount were assessed by me for the violation, the respondent could possibly work out a payment schedule with MSHA for the payment of the penalty (Tr. 321).

Although on the facts of this case, a substantial civil penalty assessment would otherwise be in order, I take note of the fact that Mr. Necessary is 61 years of age, has no steady employment, and has financial obligations which he must meet. Further, given the passage of time since the violation occurred, the fact that Mr. Necessary and others may have been the subject of possible criminal proceedings, and the fact that he has obviously incurred legal expenses in connection with these matters, I am not convinced that a substantial civil penalty is warranted. Accordingly, I conclude that a civil penalty in the amount of \$500 is appropriate in this case.

ORDER

Respondent Joseph B. Necessary IS ORDERED to pay a civil penalty in the amount of \$500, for the violation which has been affirmed in this case, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order.



George A. Koutras  
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

NOV 14 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 81-323-DM  
ON BEHALF OF :  
CHESTER JENKINS, : Republic Unit  
Complainant :  
v. :  
HECLA-DAY MINES CORPORATION, :  
Respondent :

DECISION APPROVING SETTLEMENT  
AFTER REMAND

Before: Judge Morris

This case involves a complaint of discrimination filed by the Secretary of Labor pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complaint alleged that the operator violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), in connection with three incidents involving complainant.

The case was heard by Virgil E. Vail, an administrative law judge of the Commission. The decision of the judge was thereafter reversed, in part, by the Commission because of its finding that complainant had been suspended without pay in violation of the Mine Act.

Inasmuch as Judge Vail had left the Commission, the case was reassigned to the undersigned judge for an appropriate and expeditious back pay award.

Subsequently, the judge set the case for a hearing in Spokane, Washington. Prior to hearing the parties advised the judge that the case had been settled. They filed a stipulation and agreed that pursuant to the Commission decision there is due and owing to Chester (Sam) Jenkins the sum of four hundred fifty-two dollars and six cents (\$452.06) to be paid by Hecla-Day Mines Corporation.

Based on the stipulation of the parties, I enter the following:

ORDER

1. Respondent is ordered to pay to the complainant the sum of four hundred fifty-two dollars and six cents (\$452.06).

2. Respondent is further ordered to pay said amount within ten days of the date of the decision.

  
John J. Morris  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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FALLS CHURCH, VIRGINIA 22041

**NOV 14 1984**

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 82-18-M  
Petitioner : A.C. No. 30-01185-05024  
: :  
v. : Balmat Mine No. 4 and Mill  
: :  
ST. JOE RESOURCES COMPANY, :  
Respondent :

DECISION

Appearances: William M. Gonzalez, Esq., Office of the Solicitor,  
U.S. Department of Labor, New York, New York,  
for Petitioner;  
Sanders D. Heller, Esq., Gouverneur, New York,  
for Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) seeking a civil penalty assessment in the amount of \$160 for an alleged violation of mandatory safety standard 30 C.F.R. § 57.18-25, as noted in a section 104(a) Citation No. 201695, served on the respondent by an MSHA inspector on April 29, 1981. The respondent contested the proposed assessment and the case was heard in Watertown, New York. The parties were afforded an opportunity to file post-hearing proposed findings and conclusions, and the arguments presented therein have been considered by me in the course of this decision.

Issues

The principal issue presented in this proceeding is (1) whether the respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised are identified and disposed of where appropriate in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.
4. Mandatory safety standard 30 C.F.R. § 57.18-25.

#### Discussion

The condition or practice cited as a violation in this case is as follows:

The Stope miner in the 2100 F-16 stope was allowed to perform work alone in an area on 4-27-81 where his cries for help could not be heard and he could not be seen by the employee assigned to check on him when a chunk of loose material fell from the back while scaling causing injury to employee at 8:30 a.m.

The cited mandatory safety standard, 30 C.F.R. § 57.18-25 states as follows:

No employee shall be assigned, or allowed, or be required to perform work alone in any area where hazardous conditions exist that would endanger his safety unless his cries for help can be heard or he can be seen.

#### Stipulations

The parties stipulated that the respondent is in the business of mining zinc, and that at the time the citation issued its annual production was 454,080 tons, and its annual manhour production was 2,649,998. The parties also stipulated

that for the period August 18, 1971 to approximately August 17, 1981, respondent was assessed for 50 citations which it paid. They also agreed that the proposed civil penalty of \$160 will not adversely affect the respondent's ability to continue in business, that the violation in question was rapidly abated by the respondent, and that the presiding Judge has jurisdiction to hear and decide the case (Tr. 5-6).

#### Petitioner's Testimony and Evidence

Earl S. Swem testified that he is employed by the respondent as a production miner, and he testified as to his experience and training. He confirmed that he worked at the mine in question on April 27, 1981, and he described the stope where he worked as 25 feet wide, 100 feet long, and that the roof height ranged from 40 to 60 feet (Tr. 16). He stated that on Friday, April 24, 1981, he had fired one shot consisting of six to nine holes, and that he did so to remove some hanging material. He next returned to work on Monday, April 27, 1981, and began scaling in the stope area so that he could determine where it was safe to begin work. He began scaling from the left side because "the hanging looked pretty good" (Tr. 19). He then proceeded scaling to the right side, and while moving back across the area he was struck on the head and his hard hat by a piece of rock. He continued scaling, but then "felt kind of wheezy," and he decided to go to an adjacent stope where two other miners were working to tell them what had happened. His neck began to bother him, and he was pale, and it was decided that he should leave the area. He was taken to the mine surface and subsequently went to a chiropractor who sent him to the hospital to have his neck x-rayed. The x-rays proved negative, and after some treatment by the doctor, he went home and returned to work the next day on April 28, 1981 (Tr. 20).

Mr. Swem stated that he was standing on the muck pile scaling when the rock struck him, and that he was approximately a foot to three feet from the roof. He did not see what struck him because he was struck from the rear, and he did not examine the area to determine what struck him because he was dizzy and didn't want to take the chance of something else hitting him. He confirmed that he examined the area before beginning the scaling work, and he described what the area looked like (Tr. 25). He also confirmed that prior to the incident, he had asked many times that a second person work with him in the area (Tr. 25). He stated that he has asked his boss or the checker for different helpers because "the hanging was in there, it wasn't the best to stay around by yourself, a lot of times" (Tr. 25).

Mr. Swem explained that there are usually four or five miners working in the stope areas, and an additional miner works as a "roving checker" to look in on the miners who are working. If a miner asks for additional help, the checker will assist him if he is in the area. If not, the miner must work alone or wait for additional help (Tr. 26-27). Mr. Swem stated that he has worked alone in areas performing scaling work, and that he considered some areas safe and others not. He explained that if he has to spend one or two days scaling an area "that ain't a good place to be all by yourself" (Tr. 27).

Mr. Swem stated that when he returned to work the day after the incident, scaling began in the area where he was and the hanging material was scaled down and was on the floor. Later that day Federal inspectors came to the area to inquire as to what was going on, and the next day they came back with company and union representatives to check the area out, and tests were conducted by placing someone in another stope area to determine "if they can holler and scream and if they can hear anybody" (Tr. 29).

Mr. Swem described some of the roof area the day after the incident as "drummy," and he stated that he and another miner spent most of the first day and the second day scaling, and that the area was then pinned and screened. He estimated that six to eight tons of material was scaled down, but he was not sure (Tr. 30-31). He confirmed that on the day he was struck he had scaled for about an hour before the rock hit him (Tr. 34).

On cross-examination, Mr. Swem confirmed that sometime in January 1981, he left the stope area in question and went home because of the presence of hanging material. He informed several mine officials that he was leaving because some of the hanging material fell and that he was scared, and he lost pay for that part of the day (Tr. 35). He stated that he did not know that he could leave any work area which he believed was not safe, but that the company allowed him to leave and he was not criticized, suspended, or otherwise disciplined for doing so (Tr. 36)

Mr. Swem described the work he performed on the Monday after he had fired the shot, and he confirmed that the area was screened and pinned and that he had worked the stope for two months after the pinning and screening had taken place. He also confirmed that pinning and screening is a constant procedure, and he explained how this is done (Tr. 38-40). He also indicated that he used the muck pile to stand on so

that he could reach the hanging material, and without the muck pile he could not reach the material. Once pinned, the muck is removed from the area. He confirmed that prior to being struck he was scaling from the muck pile and was also checking the roof to make sure it was safe. He tested the hanging roof area behind him and to his left, and was in the process of checking the area in front of him and to his right, and was testing it as he went in (Tr. 46). He stated that he was "comfortable" when he first went into the area to begin work, and he confirmed that what he was doing was the normal procedure for testing and making the area safe (Tr. 47). He believed that the rock which struck him had to have fallen from directly over his head and that his head was a foot to three feet from the hanging material when he was struck, and that he had tested the area (Tr. 48). He confirmed that during the drilling and scaling process, the hanging material will "work" and care must be taken to check all work areas (Tr. 49-50).

Mr. Swem stated that on the day he was struck, Mr. Cortland Bridge was serving as the "circulating miner," or "babysitter," and that he is supposed to periodically check on all miners working in the stopes and to help them scale as needed. He identified Mr. Bridge as the person who brought him out of the mine after he was struck. Mr. Swem stated that the next stope from where he was working was some 200 to 300 feet away. He described his own stope, and explained the work he had performed on the previous Friday (Tr. 52-55). When he returned to the area on Monday, he performed his usually routine safety checks, and since he was struck early in the shift, he stated that "I didn't get much time to really do a lot of checking and scaling" (Tr. 55). He confirmed that he had no pinning to do that morning, but that the men on stope did. He also described the hard hat he was wearing and stated that it was not damaged by the rock, but that it was scratched (Tr. 57).

Mr. Swem described the general condition of the stope roof areas before and after the rock struck him, and he also detailed how he goes about his pinning and safety checks, and how he scales the area to make it safe (Tr. 60-71).

David LaPlatney, testified that he was been employed by the respondent for 19 years. He was employed at the mine in question on April 28, 1981, and also served as president of the miner's union and chairman of the safety committee. He confirmed that when he learned of the accident concerning Mr. Swem, he requested that the company and the union go to the stope area in question to inspect it in order to determine what had happened, and they did so on the morning of April 28 (Tr. 79).

Mr. LaPlatney testified as to his observations of the stope area on April 29, and he believed that it would have been difficult for anyone to safely scale down the materials which he observed. He testified as follows (Tr. 81-84):

JUDGE KOUTRAS: Yes, but the point is: did he scale down some hanging material that was loose?

THE WITNESS: I'm saying for anybody to get in a position, is what I felt, to get in a position to do any kind of decent scaling, he was on the verge of being in an area that he shouldn't be in.

It was a narrow-type area and it appeared to be so much loose stuff --

JUDGE KOUTRAS: Are you suggesting that he shouldn't have been where he was at when he was scaling the roof, to make it safe?

THE WITNESS: I'm saying it was very difficult, even to be close to being safe.

Okay. When you first started into the area, beyond from where he fired, or before you get to where he fired, yes, it was pinned right there, but you start stepping out into the area where he had fired and he had apparently taken some out of the hanging. I don't know, three or four holes in the hanging, whatever it was.

JUDGE KOUTRAS: Are you suggesting that he put himself in a precarious position to do the scaling?

THE WITNESS: I'm saying anybody trying to.

JUDGE KOUTRAS: I'm talking about the gentleman who just testified, what he did to make the area safe for himself. Are you suggesting to me now that when you saw it on a Tuesday that he probably shouldn't have been where he was at when he was scaling.

THE WITNESS: Well, apparently he got it so he shouldn't have been there, but --

JUDGE KOUTRAS: No, wait a minute. Are you suggesting that he was in an area where he shouldn't have been, when he was scaling, because it was unsafe?

THE WITNESS: No. I'm saying I felt, when I see it, what chunks I seen down and still on the sidewalls, and it's drummy, just a few feet beyond where he said he got hurt it was still drummy -- in other words, you sounded it out and it was still a little bit drummy, where you had to pin or whatever.

JUDGE KOUTRAS: Could one conclude that, had the rock not fallen and struck him, that he would have gotten to that area and scaled it down and that's what was left when he was interrupted by the striking?

THE WITNESS: It's hard to determine because it was in such a way, the way the roof was arched -- okay? -- and then up near the top, the center of the arch, you had these slips that were going up out of it. Okay. You scale a chunk off the left side, say. That could very well and probably was what was holding this drummy area; see what I'm saying?

So it would be very difficult for anyone -- in other words I'm saying it was an exceptional area, really, to try to scale it.

JUDGE KOUTRAS: What would be your suggestion, then? As to how to scale it and bring that unusual, exceptional roof area down?

THE WITNESS: I don't know. I figured that was probably up to management to --

JUDGE KOUTRAS: Well, no, you're the chairman of the safety committee. You go in there with a couple of safety people and I assume some people that were concerned; how would you --

THE WITNESS: Quite possibly -- they had their scraper bucket there. Nobody has mentioned that. What they were doing is, at times after he had fired they would have to scrape the top of the muck pile out, in order to get it down low enough so that they could rock bolt.

Okay. So you had that problem, too, in that one section, one side. You know, the muck was too close to the hanging for them ever to put a rock bolt in. They had to strip it down a little bit to get the right distance.

So you had -- well, you just had what I considered a dangerous area to try and do anything in, really. In my experiences.

Mr. LaPlatney also described the condition of the room area away from the stope area where Mr. Swem had been working, and he stated that he observed some roof cracks and some hanging material (Tr. 102-106). Mr. LaPlatney stated that he was disturbed over the fact that the shift boss was making determinations as to whether or not a particular miner needed the helper without first examining or viewing the stope areas where they were working. He also alluded to the fact that the shift boss stated that the helper was not there to do the work of the miners, and that the helper was expected to make his rounds every hour (Tr. 107). Mr. LaPlatney was of the opinion that the area was unsafe because Mr. Swem was not within hearing distance of anyone, and that this was a hazardous situation (Tr. 107). Based on his observations, even if the rock had not struck Mr. Swem, Mr. LaPlatney would still be of the view that he probably should have had a second person present with him when he was working in the stope area in question (Tr. 127).

On cross-examination, Mr. LaPlatney asserted that his reasons for requesting an MSHA inspection was based on his opinion that the company should have provided a second helper to Mr. Swem, and had this been done there would have been no need for an MSHA inspection (Tr. 129). Mr. LaPlatney confirmed that under a provision in the union/management agreement, when an employee observes an unsafe condition he should immediately notify his foreman, and that the foreman will take corrective action, which may include assigning the employee to other work (Tr. 129). Mr. LaPlatney confirmed that no citations for loose, hazardous materials were issued by MSHA with regard to the stope in question (Tr. 145).

Raymond F. Drake, stated that he is an MSHA metal and nonmettalic mine safety inspector, and that he has been so employed for six years. He testified as to his mining background and experience, and he confirmed that he participated in the investigation of the incident concerning Mr. Swem on April 28, 1981 (Tr. 158). He confirmed that former Inspector Paro issued the citation in question in this case along with him, and he confirmed that Mr. Paro is no longer employed by MSHA (Tr. 160).

Mr. Drake confirmed that he and Mr. Paro were assigned the task of conducting an investigation into the incident concerning the rock striking Mr. Swem, and he confirmed that the investigation was prompted by Mr. LaPlatney's telephone call to MSHA (Tr. 162). Mr. Drake confirmed that he arrived at the mine on Tuesday, April 28, and went underground that afternoon with company and union representatives. He and

the group stopped by the stope area adjacent to the area where Mr. Swem was working, and they then proceeded to the stope area where Mr. Swem had been working on the previous day, which he believed to be approximately 300 feet away. When he arrived at the stope, Mr. Swem was present, and Mr. Swem confirmed to Mr. Drake that the area was safe (Tr. 165). After speaking with Mr. Swem about the incident on the prior day, Mr. Drake stated that he observed the area, and he stated that "there was definitely questionable ground in the area" (Tr. 167).

Mr. Drake stated that when he observed the stope area where the rock struck Mr. Swem, he stood on the muck pile back away from the immediate location, but that he did observe "several cracks, slips, in the immediate area, you know, in front of us, where Mr. Swem had been roofing" (Tr. 169). Mr. Drake was not sure as to whether anyone else physically examined the area, and he confirmed that he simply "eyeballed it" (Tr. 171). He did confirm that when he arrived on the scene Mr. Swem and another miner had been scaling the accident area down for at least three to four hours (Tr. 173-174). Mr. Swem pointed out the material which had been mucked down (Tr. 185).

Mr. Drake confirmed that the inspection party conducted a "holler test" and took measurements, and he indicated that this was done by someone going to the adjacent stope and yelling as loud as they could to see whether they could be heard from the stope area where Mr. Swem was working at the time of the accident (Tr. 187). The shouts could not be heard (Tr. 187).

Mr. Drake confirmed that when he and the inspection party viewed the accident scene, scaling was taking place by two men and since the conditions were being taken care of, no citations could have been issued because of the presence of any hazardous materials (Tr. 197). Mr. Drake stated that he could not recall speaking to any mine management personnel to determine whether the stope where Mr. Swem was working at the time of the accident had been previously inspected. He also confirmed that he did not review any mine inspection records, but he did recall asking Mr. Swem, and that Mr. Swem informed him that no one had inspected the area (Tr. 209)..

Mr. Drake confirmed that during the close out conference held after the inspection party left the stope area, he and Inspector Paro determined that the violation should be issued, and that he (Drake) believed that Mr. Swem had worked in a hazardous area, that his cries could not be heard, and that he could not be seen. Since these facts fit all of the criteria,

he decided that a citation should issue (Tr. 213-214). His determination that the area where Mr. Swem had worked was hazardous, was based on the considerable scaling which had been done before he was struck, and the fact that "there was other loose in the immediate area" (Tr. 214-216). He also considered the fact that the area had been extensively pinned and scaled, and that led him to believe that "there's a problem there to begin with" (Tr. 216-220).

On cross-examination, Mr. Drake testified as to his MSHA and mining training (Tr. 253-257). He confirmed that his determination as to whether any mine area is "hazardous" is made by observation and testing (Tr. 259). He also confirmed that he believed that Mr. Swem was scaling material from about 7:45 a.m. to 8:30 a.m. (Tr. 261). He also confirmed that he took Mr. Swem's word for the fact that when he asked him whether the area where he was working was "safe," Mr. Swem responded that "he felt he wasn't in a hazardous area when he started scaling" (Tr. 263).

When asked whether the fact that the area where Mr. Swem was working had been previously pinned influenced his decision that it was hazardous, Mr. Drake replied "No, it didn't" (Tr. 264). He further explained as follows (Tr. 265-266):

A. You can have a considerable amount of loose, but it could be flaky stuff, and everybody here knows what I'm talking about, about flaky stuff. But you can have a considerable amount of loose, pieces as big as this table, and that's a different situation.

Q. Now, you said there were big pieces barred down from the roof that you saw?

A. No, sir. I said they were two and half feet long.

Q. Those aren't big?

A. That's what I said. You asked me what I said.

Q. Two and a half feet long. They were barred down from the roof; is that right?

A. That's correct.

Q. Do you know if any of those followed the bar down to the miner's arm or hand?

A. No, I don't.

Mr. Drake conceded that during the time a company person was assigned and in the stope area, the company would be in compliance with the standard in question (Tr. 270). He also conceded that the individual miner has to check out his own stope area, and he confirmed that there is no mandatory standard that requires mine management to inspect the workplace before a miner is allowed, required, or assigned to perform work there (Tr. 272-273). He also conceded that there was no reason for the respondent to prevent Mr. Swem from going to his stope work area at the beginning of his work shift (Tr. 273). He also conceded that within 30 hours after the accident, Mr. Swem told him that he did not believe the stope was hazardous when he went in the area to work on Monday morning (Tr. 274).

Mr. Drake confirmed that he did not sign the citation form issued in this case (Tr. 275), and he confirmed that he and Mr. Paro decided on Wednesday afternoon, April 29, that the violation of § 57.18-25, had occurred on Tuesday, April 28 (Tr. 275). He also confirmed that Mr. Paro called his supervisor during the time they were discussing the citation, but Mr. Drake denied that they discussed the question as to whether a citation should be issued (Tr. 276). Mr. Drake also confirmed that his notes do not state that he actually made a determination as to the stope being a hazardous area (Tr. 279), and he conceded that a miner is free to make his own determination in this regard (Tr. 280-281).

#### Respondent's Testimony and Evidence

Cecil J. Howard, confirmed that he is employed in the respondent's safety department and that he investigated the incident concerning Mr. Swem. He described what he observed at 8:30 a.m. on Tuesday, April 28, 1981, during his visit to the stope area, and he was of the opinion that no hazardous conditions existed. In support of this conclusion, he testified as follows (Tr. 299-301):

A. I base that on the soundness of the hanging with the scaling bar. If it's good hanging and that chunk, I agree with you that it was way up because Earl had fired six ten-foot holes -- right? It was ten foot long. The chunk was partially in the hanging and in the face and you just couldn't get ahold of it and scale it down. Otherwise the hanging was all right.

Q. Was the chunk hazardous?

A. No, the chunk was no hazard because if Earl didn't have help he could have stayed away from the chunk, he could have worked on the lefthand side, and, as it was, the stope was about 15 foot wide and nine foot in the center and then it parts down and it was pinned and everything back there, and Earl was firing on the lefthand side.

He fired this shot ahead and then he was going to go back and fire the lefthand side through, so he could have come back and started drilling, or he could have went out, got on the phone which was in the area, called up Lance Richards and said, I believe I have a problem down here; would you come down and look at this stope; maybe I'll need some help.

Q. What about the cracks in the hanging and the seams?

A. Oh, you always have cracks and seams, especially in that area where you get layers upon layers of grounding, but once you sound them and you can't scale them down there is no hazard, as long as they're not drummy.

Q. Did you find anything that was drummy that day?

A. That one chunk, near the face.

Q. Other than that?

A. No, just a few small pieces I scaled down, which you can always get.

Q. And you had an opinion that day as to whether or not that area was hazardous?

A. That's right.

Q. And your opinion, which you have already stated --

A. I've already stated.

Q. -- was that it was not hazardous?

A. I didn't say it was hazardous, no.

Mr. Howard stated that on the morning and afternoon of April 28, he sounded and observed the stope in question and found that it was not hazardous. He confirmed that he was present when Inspector Paro questioned Mr. Swem about the rock falling. Mr. Howard estimated the distance between the stope where Mr. Swem was working, and the adjacent stope where John MacIntosh was working as "probably between two and three hundred feet" (Tr. 305).

On cross-examination, Mr. Howard confirmed that he made notes of the results of his investigation of the rock falling incident concerning Mr. Swem, and he made them available to MSHA's counsel for his examination (Tr. 305-306). He confirmed that he did not go to the stope the day of the accident, but went there the next morning. When he arrived, Mr. Swem and his helper Mr. Cortland Bridge were scaling (Tr. 308). Mr. Howard stated that after his arrival at the stope on Tuesday, after Mr. Bridge left, he (Howard) checked the stope area by scaling it and he indicated that "we took down a few small pieces but it was good" (Tr. 309).

Mr. Howard stated that the previous Friday, Mr. Swem had fired six ten foot holes and advanced the stope by some ten feet. A "chunk" of material left in a corner of the stope was then shot down after Mr. Howard sounded it and discussed it with Mr. Swem (Tr. 311-312). Mr. Howard indicated that anytime anyone cannot scale alone, they are free to seek help (Tr. 313). He denied any knowledge of any prior hazardous roof conditions in the stope, and he indicated that everytime he visited the stope it was being pinned in preparation for "taking bottom." He also indicated that Mr. Swem always controlled his stopes by scaling, pinning, and screening (Tr. 324). At no time on Tuesday did he believe the stope was hazardous (Tr. 325).

Lance Richards, testified that on April 27, 1981, he was the mine foreman, and was Mr. Swem's supervisor. He stated that on that day Mr. Cortland Bridge was assigned to check on three men working in stopes which were about 300 feet apart, and that Mr. Swem was one of them. After Mr. Swem was struck, he (Richards) did not go to the stope because he wanted to first contact Mr. Howard and the union representative (Tr. 325-327).

Mr. Richards stated that he visited the stope on Tuesday, April 28, with Mr. Howard and Mr. LaPlateny. They discussed some material that was "hanging" on the left side of the stope, and they also tried to determine what had fallen and struck Mr. Swem. Since precautions were being taken in the stope, no

one believed that it was hazardous (Tr. 330). The loose muck pile material in the stopes served as an "elevated platform" for Mr. Swem to work from, and some of the stope area was screened (Tr. 333).

Mr. Richards stated that Mr. Bridge was assigned to assist the three stope men, and that his assistance to them filled both a safety need and sometimes made their work go faster (Tr. 336). Mr. Bridge was not given specific instructions, and Mr. Richards indicated that he likes to give him a little freedom in dealing with the stope men (Tr. 336). Mr. Richards identified exhibit R-1 as the accident report that he prepared concerning Mr. Swem's injury (Tr. 337).

Mr. Richards was of the opinion that "the hanging" he observed in the stope on Tuesday and Wednesday after the accident was not hazardous (Tr. 340). In support of this opinion, he cited the fact that the hanging was within reach and could be controlled (Tr. 342).

On cross-examination, Mr. Richards confirmed that he did not know how Mr. Swem was scaling the stope prior to the accident, but he had no reason to believe that Mr. Swem was doing anything incorrectly. However, if Mr. Swem knowingly worked under loose material, then that would be a hazard (Tr. 346). When asked about the "loose" he observed, Mr. Richards testified as follows (Tr. 349-351):

Q. When you looked at that stope, did you determine that that stope was hazardous, that that chunk was hazardous?

A. That chunk?

Q. Yes.

A. If you were standing underneath it and it fell on you, it would be hazardous.

Q. You recognized that it was hazardous, based on your observations?

A. He didn't have to be in that particular section of that stope. We knew it was hazardous and we -- we knew it was loose and we've taken care of the problem.

Q. Okay. Would you describe it for me? What did the loose look like?

A. It's a piece of loose rock, unconsolidated rock. When you hit it with the scaling bar, the

sound waves, when they travel through the rock, are broken, and it gives a dull sound.

Q. Is that what you used to determine it was hazardous, that chunk?

A. That the chunk was loose.

Q. Just that, the sound of it?

A. The sound, yes. That's how you do it. You use a scaling bar.

Q. Okay. Now, you didn't go into the area on the -- on Monday the 27th; is that correct?

A. No, I didn't go there.

Q. The first time you went into the area was on Tuesday morning the 28th?

A. Right.

\* \* \* \*

Q. What did you see Cortland Bridge and Earl Swem do?

A. What did I see them do?

Q. Yes, if anything.

A. I didn't see them doing anything. Like I said, when I got up there, I talked to John and then John showed me that one chunk and Cortland and I both tried it.

Q. Right.

A. I wanted to see for myself if two bars would bring it down. Of course, they wouldn't.

In response to further questions, Mr. Richards stated that when miners ask for a second man to be present in situations where hazardous conditions may be encountered, a second man is provided (Tr. 360). He did not believe that the stope was unsafe for Mr. Swem to be working alone on either Monday or Tuesday (Tr. 368).

Larry Streeter, assistant mine superintendent at the time of Mr. Swem's injury, confirmed that he first visited the stope in question on Tuesday afternoon, the day after the accident, and that he was with the inspection party at that time (Tr. 370). Mr. Streeter stated that he observed "routine scaling" that was to be done that day, and that the distance between Mr. Swem's stope and Mr. MacIntosh's stope was a minute and ten seconds by walking (Tr. 371). He and Mr. Bridge went to the adjacent stopes as part of a "holler test," and he stated that "apparently it wasn't heard" (Tr. 371).

Mr. Streeter stated that he heard Mr. Swem tell one of the inspectors that he was not working under loose ground and that "he thought he had it secured above his head" (Tr. 371). He also testified that he heard Mr. Swem state that prior to the accident, he was scaling on the right side of the stope and continued to scale out into the stope in front of the pinned area at the time he was hit (Tr. 372).

On cross-examination, Mr. Streeter reiterated that he did not believe the stope area was hazardous when he was there on Tuesday following the accident, and he was of the opinion that Mr. Swem had the opportunity to do his job safely because a portion of the stope was pinned and screened, and he could sound the roof and advance and scale from under the pinned area, sounding as he went (Tr. 380).

Mr. Streeter indicated that if a miner complained about an unsafe condition and there was no other person available to be assigned to help him, the miner would be assigned other work (Tr. 388).

#### Arguments Presented by the Parties

In his arguments made during the course of the hearing, petitioner's counsel recognized the fact that the incident prompting the issuance of the violation in question took place over three years ago. However, counsel relies on the testimony of the inspector and Mr. Swem to support his arguments that he has established that the cited area was in fact hazardous (Tr. 293).

In its post-hearing brief, petitioner submits that the factual record in this case has established, by a preponderance of the evidence, respondent's violation of section 57.18-25. Petitioner maintains that the testimony describing the stope area where Mr. Swem was struck supports a conclusion that a hazardous condition existed, and that Mr. Swem was working alone in the stope where he could not be seen nor heard.

Petitioner maintains that Mr. Swem's failure, if any, to recognize the hazardous conditions in the stope does not relieve the respondent of its obligation to comply with the requirements of section 57.18-25. In support of this argument, the petitioner asserts that the Act establishes a standard of strict liability for violations of mandatory safety standards, without regard to fault or negligence, and that the legislative history of the Act reflects that Congress was particularly concerned over the high number of mining injuries and fatalities resulting from inadequate supervision and hazardous workplace conditions reasonably within the power of management to prevent.

During the course of the hearing, respondent's counsel argued that unless MSHA establishes that the cited stope area in question was hazardous, it may not insist that another person be at or near the stope so as to hear or see him (Tr. 289). Counsel pointed out that in this case Mr. Swem told the inspector that he did not believe that the stope area where he was working was hazardous (Tr. 290), and that the inspector's testimony concerning the amount of material which he claims was scaled down should be given little weight because the scaled material resulted from the work of two miners well after the rock fall incident in question (Tr. 291). In short, respondent's counsel is of the view that MSHA has failed to establish that the cited area was hazardous, and until that is established MSHA cannot require the presence of another person pursuant to the cited standard (Tr. 291).

Respondent's counsel conceded that the incident concerning the rock which fell and struck Mr. Swem on his hard hat may be classified as an "accident." Notwithstanding the fact that the incident was not the type of accident which had to formally reported to MSHA, counsel asserted that the fact that it happened does not per se establish that the area where Mr. Swem was working was "hazardous." Given the fact that Inspector DRake conceded that had the incident not occurred, no citation would have been issued, counsel maintains that the asserted violation may not be sustained simply because Mr. Swem was struck by some falling material. Counsel concludes that the occurrence of such an incident does not establish that the respondent knew that a hazardous condition existed, and decided to assign Mr. Swem there anyway (Tr. 292).

In its post-hearing brief, respondent points to the fact that Mr. Swem told Inspector Drake that he knew he was responsible for his own safety, and that respondent's safety representative, the mine foreman, and the assistant mine superintendent, all experienced miners, testified that in their opinion, the stope area where Mr. Swem was working was not hazardous.

The respondent emphasizes the fact that the day following the accident, Mr. Swem and a co-worker scaled the same stope before Mr. LaPlatney, the mine superintendent, and Inspector Drake appeared on the scene, and that no one except Mr. Swem had an opportunity to observe the conditions that existed at the time that the rock fell and struck his hard hat. At this time, the condition of the stope had changed, both by time and by the work done in the immediate area, and the fact materials had been scaled down is not indicative of any hazardous condition.

The respondent further points out that the scaling work conducted by Mr. Swem and the checker assigned to that area on the morning following the incident in question was for the purpose of "making the stope safe," and that they were following their first job requirement to check and secure their work area in order to "make it safe" before any further work is done. When Inspector Drake arrived on the scene, he accepted Mr. Swem's statement that the stope area was safe to work in, yet he did not accept Mr. Swem's prior decision the day before that the area was not hazardous.

Respondent maintains that the one person who was in the best position to testify as to the amount of scaling done in the stope at the time of the accident was Mr. Swem, and that his testimony indicated that he did not think that the area was hazardous. Further, although Mr. Swem conceded that he could have asked for additional help while he was in the stope prior to the time he was struck if he thought the area was hazardous, he did not do so.

Respondent points out that normal mining practice calls for the scaling and barring down of materials after a shot is fired, and miners are instructed to find a safe way in, a safe place to stand, and to start scaling to make additional areas safe. On the facts of this case, respondent asserts that when Mr. Swem went to his stope work area on Monday, April 27, 1981, after having last fired his shot on his previous work shift on Friday, April 24, 1981, he determined that he had a safe way in, that he had a safe place to stand, and then began to scale. In short, since he was the miner on the scene, he made the determination that it was safe to attend to his work.

Respondent argues that it had no reasonable opportunity to inspect the stope prior to the time Mr. Swem started his work in the stope on Monday, April 27, 1981. Even so, respondent maintains that its supervisory officials would not have made any prior determination any differently than that made by Mr. Swem on the scene, and that they would have relied on his determination that he had a safe place to work.

With regard to union representative LaPlatney's testimony, respondent asserts that his motivation in reporting the incident concerning Mr. Swem to MSHA, was an attempt to force the respondent to provide two men for each job performed in the stope. Respondent maintains that Mr. LaPlatney's testimony reflects that had the respondent provided a second man for each stope miner, or agreed to future discussions in this regard, he would not have notified MSHA. Respondent concludes that MSHA was responding to a union attempt to increase the working force, and not to a safety hazard.

Respondent further points out that Mr. LaPlatney could not affirmatively state that the stope area was hazardous, and that he admittedly failed to follow the agreed upon labor-management procedure requiring the union to call the respondent's attention to any alleged hazardous condition.

### Findings and Conclusions

In this case the respondent is charged with permitting Mr. Swem to work alone in a hazardous area where he could not be seen or heard in the event of an emergency situation jeopardizing his safety. Since the petitioner has the burden of proof, it must establish that the stope area where Mr. Swem was assigned to work was hazardous, and that notwithstanding this fact, it nonetheless permitted him to work there, thereby exposing him to the hazard of being struck by falling material. In my view, the critical issue here is whether or not the respondent could reasonably be expected to know that the stope area in question was in fact hazardous, and whether or not it took reasonable steps to preclude the type of "accident" which occurred in this case. The condition precedent to any finding of a violation lies in the clear language of the standard which requires an initial showing that hazardous conditions existed at the time a miner is "assigned, or allowed, or required to perform work alone."

There is no dispute here that Mr. Swem was working alone at the time he was struck on Monday, April 27, 1981. Further, there is no dispute that the tests conducted during the investigation of this incident established that anyone working in the stope could not be seen or heard by other miners working in the adjacent stopes in the event he cried out for help.

Petitioner relies on the testimony of Mr. Swem to support its conclusions that the stope area where he was working on Monday, April 27, 1981, was hazardous, and that since his cries could not be heard, a second miner should have been assigned to work with him. Notwithstanding the fact that

Mr. Swem readily conceded that he believed he was safe and did not consider his immediate work area to be hazardous, petitioner relies on his testimony that the roof area where he was struck was in a "bad condition" and had some "cracks and slips" in it. Petitioner also cites Mr. Swem's testimony that following the accident, and beginning on Tuesday, April 28, 1981, Mr. Swem and miner helper Bridge continued to scale the stope area in order to "make the stope safe," and that Mr. Swem observed that the roof area contained some "hanging" material that sounded "drummy."

There is a conflict in the testimony and evidence as to whether or not the stope area where Mr. Swem was working on Monday, April 27, 1981 was hazardous. Mr. Swem, the miner who was struck by a rock or other falling material, testified that he believed the area where he was working in was safe, and he indicated that after testing the roof areas and following his normal scaling procedures in order to make his work area safe, he felt comfortable in the stope.

The record in this case establishes that the stope area in question was fired during the last shift worked by Mr. Swem on Friday, April 24, 1981, before he next returned to work on Monday, April 27, 1981. Since he was the first miner on the scene and would necessarily be more closely concerned with his own safety, his candid admission that he believed the area was safe to work in is, in the circumstances, the best evidence as to whether or not the stope conditions were hazardous. This is particularly true here where the alleged violation occurred over three years ago. In the circumstances, I have accorded substantial weight to Mr. Swem's testimony in this regard.

Respondent's un rebutted testimony is that it had assigned Mr. Cortland Bridge as an extra helper to assist the three stope miners who were working on Monday, April 27, 1981, and Mr. Swem conceded that Mr. Bridge was serving as a "circulating miner" and was available to check out the stope miners and to help them scale as needed. Further, three company officials, all of whom are experienced miners, visited the stope area in question the day following the accident and testified that they believed the area was not hazardous. The union representative who also visited the same area that same day with the inspection party could not state with any degree of certainty whether or not the area was hazardous. Mr. Swem, who had been scaling the area with Mr. Bridge during that day, told the inspector that the area was then safe and not hazardous. Faced with all of these facts, Inspector Drake chose to believe Mr. Swem's evaluation that the area was then safe and

not hazardous, but apparently chose not to believe his candid admissions that the conditions the day before were not hazardous and that he felt "comfortable" and safe working in the stope. More suprisingly, petitioner relies on the scaling work done by Mr. Swem and Mr. Bridge the day after the incident in question to support a theory that the existence of this material prior to its being scaled down establishes that the area was hazardous the day before. I find petitioner's position in support of its case to be contradictory.

Petitioner also relies on Inspector Drake's after-the-fact evaluation of the stope to support its assertion that the stope was hazardous when Mr. Swem initially reported there to begin his work. After careful review and consideration of Mr. Drake's testimony, I conclude that it is contradictory and equivocal and does not support petitioner's arguments that it has proven its case by a preponderance of the evidence. My reasons in support of this conclusion follow below.

Inspector Drake's direct testimony that he considered the stope area in question to be hazardous because prior scaling and pinning in the area led him to believe that there had been a preexisting "problem," is contradictory. On cross-examination, he denied that the previous pinning influenced his decision that the area was hazardous.

In view of Inspector Drake's recognition of the fact that a miner is free to make his own determination as to whether or not his work area is hazardous, I find it rather strange that he would accept Mr. Swem's determination on the day following the accident that the stope was at that time not hazardous and safe, yet reject or ignore that very same determination made by Mr. Swem the day before when he was working in the same stope. Inspector Drake conceded that Mr. Swem told him that he did not believe the stope was hazardous when he went to work on Monday morning, yet Inspector Drake concluded that at the time of the accident the area was hazardous. He did so after he and fellow Inspector Paro discussed the matter further during a close-out conference held after the inspection party left the stope area at the conclusion of the accident inspection. Since Inspector Paro is no longer employed by MSHA and did not testify in this case, any observations that he may have made at the time he signed and issued the citation are not available.

I take note of Inspector Drake's candid admissions that during his discussions with Inspector Paro prior to the

issuance of the citation, Mr. Paro telephoned their supervisor. Although Mr. Drake denied that they discussed the question as to whether a citation should be issued, I cannot believe that this call was totally unrelated to the accident inspection conducted by Mr. Drake and Mr. Paro. I also take note of Inspector Drake's testimony that his contemporaneous notes made at the time of his inspection do not reflect that he made any determination that the stope area in question was hazardous.

I take particular note of Inspector Drake's testimony that he cited section 57.18-25, because no other standard was applicable to the facts presented. It seems to me that absent any facts to support the contention that the area was in fact hazardous, and that the respondent somehow permitted Mr. Swem to enter a work area which endangered his safety, an inspector should not rely on after-the-fact speculative conclusions simply to justify or support a violation which he may feel compelled to issue in response to a complaint for an accident inspection or investigation.

Petitioner's arguments imply that the respondent should have made a determination that the stope area where Mr. Swem was working on Monday morning was hazardous, and that recognizing this fact, respondent had an obligation to assign a second miner to work with Mr. Swem. This argument is not well taken. Aside from the fact that Inspector Drake admitted that he did not review any mine inspection records, and could not recall whether he asked mine management whether the stope had been inspected before Mr. Swem arrived there Monday morning, he conceded that there is no mandatory standard requiring management to inspect the workplace before a miner is allowed, required, or assigned to perform any work. It seems to me that if MSHA wishes to impose such a requirement on a mine operator, then it should seriously consider promulgating a standard to cover just such a situation.

I also take particular note of Inspector Drake's testimony in explanation as to why he felt compelled to cite section 57.18-25. At page 390 of the hearing transcript, he stated that "There wasn't any other violation, as far as I'm concerned. The man was there taking down the loose.' That's all you could reasonably expect a man to do. He was working at the situation at the time" (Tr. 290). In my view, this is the essence of this case. Mr. Swem was working in a stope which he considered safe and not hazardous, and was going about his business making the area safe by scaling so that he could continue his work. It is unfortunate that the unexpected event occurred, and fortunate that he was not seriously injured. However, on the facts of this case, I cannot conclude that the respondent's failure to comply with the cited standard was the proximate cause of this incident.

I reject the petitioner's reliance on Mr. Swem's testimony as to the conditions of the roof area in the stope to support the notion that the area was "hazardous," thereby requiring the presence of a second miner. Mr. Swem was obviously aware of these conditions and that it is precisely why he was following his normal precautionary procedures to test and scale as he went about his work. It seems to me that if he was really concerned about these conditions to the point where he felt he needed assistance and a second miner present, he had ample opportunity to summon such assistance. However, on the record here, he admitted that he felt safe and comfortable in the stope. Had he believed otherwise, he was free to leave work as he had done in the past when he felt exposed to hazardous conditions.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has failed to establish by a preponderance of any credible evidence that the stope area where Mr. Swem was working on Monday, April 27, 1981, was a hazardous area known to the respondent, and that the fact that Mr. Swem was working there alone does not establish a violation of section 57.18-25, by the respondent. Accordingly, section 104(a) Citation No. 201695, served on the respondent on April 29, 1981, IS VACATED, and this case IS DISMISSED.

  
George A. Koutras  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

NOV 16 1984

ALBERT VIGNE, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. SE 84-2-DM  
: MD 83-51  
GALL SILICA MINING COMPANY, :  
Respondent : No. 2 Mine and Plant

## DECISION

Appearances: Albert Vigne, Lake Wales, Florida, pro se;  
Michael D. Malfitano, Esq., Macfarlane, Ferguson,  
Allison & Kelly, Tampa, Florida, for Respondent.

Before: Judge Koutras

### Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant Albert Vigne against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Mr. Vigne filed his initial complaint on June 8, 1983, with the Secretary of Labor, Mine Safety and Health Administration (MSHA), claiming that his discharge on or about April 29, 1983, as a supervisor of the drying plant was discriminatory in that it was based on "my concern for safety there and my cooperation with MSHA representatives." Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and Mr. Vigne filed his pro se complaint with this Commission.

Although both parties were provided with an opportunity to file post-hearing arguments, only the respondent did so. However, Mr. Vigne did file certain information concerning his contested unemployment compensation claim with the State of Florida, including copies of the findings of a State appeals referee who upheld his claim.

### Issue

The critical issue in this case is whether Mr. Vigne's discharge was in any way prompted by his engaging in any protected activity under section 105(c) of the Act, or whether it resulted from differences with his superior regarding his work responsibilities.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).
3. Commission Rules, 29 C.F.R. § 27001., et seq.

Testimony Presented by the Complainant

Albert Vigne testified that approximately six or seven months before his termination in April 1982, MSHA Inspector Gene Weaver made a "courtesy" inspection of the mine, and issued several memorandum "citations" regarding the lack of guards around several belts and chains. Mr. Vigne stated that he wrote up some work orders to correct the conditions pointed out by Inspector Weaver, and that he also advised Mr. Tony Haire, the plant supervisor, about the conditions in question (Tr. 8-13).

Mr. Vigne stated that he continued writing work orders for a period of five months, and that he wrote up five or six of them in an effort to correct the conditions brought to his attention by Inspector Weaver (Tr. 13). After Mr. Weaver's visit, MSHA Inspector Richardson visited the mine, and after finding that the conditions had not been corrected, he issued citations for a lack of guards on certain belts on the bagging machine belts and conveyors, and the belt on the second floor sand hopper (Tr. 17-18). The citations were not served on Mr. Vigne, and he did not know who they were served on. However, he believed that fines were served on the respondent as a result of the citations (Tr. 19).

Mr. Vigne stated that shortly after the citations were issued, Mr. Haire came to his work area and indicated that a large hopper outside the dry plant building needed painting. Mr. Vigne assigned some men to paint the hopper, but the next day, Mr. Haire returned to the area and informed Mr. Vigne that he wanted him to paint it. Mr. Vigne stated that he informed Mr. Haire that he was a supervisor and was not required to do manual labor. Mr. Haire informed him to "think it over" and left. The next day, Mr. Vigne informed Mr. Haire that he still objected to painting the hopper, and Mr. Haire put him on notice that he would be terminated in one week. When asked why Mr. Haire terminated him, Mr. Vigne replied as follows (Tr. 22-23):

Q. When Mr. Haire told you that he was going to give you one week's notice, is that the way he put it?

A. I'm going to give you one week's notice.

Q. Did you have any discussion with him as to the whys and the wherefores, or did you simply accept what he told you?

A. No, I knew that he wanted to get rid of me. That was evident.

Q. What made you believe that he wanted to get rid of you?

A. Just his attitude toward me.

Q. That day?

A. Not only that day, but other days also.

Q. What was his attitude toward you on other days?

A. Like he didn't really have any -- didn't have any confidence in me, or just -- I would say contemptuous attitude almost.

Mr. Vigne testified that at the time he was terminated, Mr. Haire made no mention of the MSHA inspections, and Mr. Vigne did not mention them (Tr. 25). Mr. Vigne also stated that he had never complained to any MSHA or state mine inspectors about any safety matters, and that he never complained to respondent's safety department (Tr. 26). He also confirmed that he never discussed such matters with Mr. Haire (Tr. 26).

Mr. Vigne stated that at the time of his discharge he was employed by the respondent as the drying plant supervisor, and that he was first hired in October 1977. His salary was \$235 a week, plus a company hospitalization plan to which he contributed, paid vacations, and a gas allowance (Tr. 28). No overtime pay was provided, and since his termination he has worked as a maintenance person in a mobile home park and for the Procter and Gamble Company (Tr. 29).

Mr. Vigne stated that he was not given any written termination notice and that Mr. Haire simply told him that "everybody is going to work" (Tr. 29). Mr. Vigne also confirmed that after a contest with the State of Florida, he received unemployment benefits (Tr. 30), and that he was currently employed at a mobile home park (Tr. 31).

When asked why he believed he was discriminated against, Mr. Vigne replied as follows (Tr. 32; 35-36):

A. Well, I think that after Mr. Richardson came, I feel that I talked to him about some things that were going on around there other than, you know, the things that he wrote up. I feel that because of my conversation with him he was able to see other discrepancies, and I think Tony Haire realized this.

\* \* \*

Q. Okay. Now, as a result of that conversation, what did Mr. Richardson do, or what could he have done that --

A. Well, I think that --

Q. Mr. Vigne, let me finish.

A. I'm sorry.

Q. That's okay. What could he do or what could he have done that would have caused some problems with mine management, which in turn would have caused some problems for you?

A. Well, I think he could have gone and looked in certain areas and caught things that he might not have caught before, and I'm sure that the people involved -- through that, somebody had put a bug in his ear, so to speak.

Q. Did he do that, do you know?

A. I think he did. I mean, I didn't follow him around, but that's the impression that I got from comments that I heard.

Q. Would Mr. Haire have been -- would Mr. Haire have been aware of your conversations?

A. He would have been probably the first one that was aware of it at the time, I would imagine.

Q. Why would that be?

A. Well, Mr. Haire is a very intelligent man, and I would say that Mr. Haire stays on top of everything. He and his people keep him informed about everything or else they don't remain his people.

Q. Well, let me ask you this, though. What specifically could Mr. Richardson have done that would have involved Mr. Haire as far as you were concerned?

A. Well, he could have gone -- he could have come in at inopportune times. In other words, you know, you can pretty well say well, it's been six months since MSHA has been here, you know, we're going to kind of start looking for him. But let's say they were here yesterday and then they came back a week-and-a-half later, and that would surprise everybody.

Q. Did that happen, do you know?

A. I heard that it did after I left.

In response to questions from respondent's counsel, Mr. Vigne testified as to his duties as the dry plant supervisory foreman, and he confirmed that he has had no contact with MSHA Inspector Richardson since his termination (Tr. 40-44). He also confirmed that he did not inform Mr. Haire or Mr. Dibble about any of his conversations with Inspector Richardson (Tr. 44).

Mr. Vigne stated that Inspector Richardson would have issued the citations even if he (Vigne) had not discussed the work orders with him (Tr. 52). Regarding his own responsibility for the conditions which were cited by the inspector, Mr. Vigne testified as follows (Tr. 53-54):

Q. Were you with him during the inspection?

A. Yes.

Q. Did he point things out to you during the inspection that were violations of safety?

A. Yes. We had to move a ladder that was on the wrong side of the hopper or something.

Q. Now, as the foreman of the dry plant, and the person who is in complete charge of the plant, as you testified, were you aware of these violations before Mr. Richardson came in?

A. No, not all of them, because when you have two different inspectors, one inspector may look at something and not consider it unsafe, where another inspector would look at it and consider it unsafe.

I remember one time in the past there was a railing that stopped at the end of a catwalk and had been there for years, and nobody had ever said anything about it, but I don't remember which inspector it was, it might have been Richardson, but we had to have another piece on that railing. And that's dangerous, but nobody had ever said it was dangerous to me before.

Q. Did you consider it dangerous?

A. It would possibly be, you know.

Q. Did you ever make any effort to do anything about it?

A. Well, I never noticed it in that light until he called it to my attention; let's put it that way.

Q. But as a supervisor, you are in complete charge of safety for the dry plant; is that correct, or were --

A. Well, I would say as a supervisor, I think each supervisor is more or less responsible for safety in his own department.

Mr. Vigne conceded that his superior had criticized his work in the past, but he denied that he had ever been formally disciplined about his work (Tr. 59). He confirmed that he voluntarily left the respondent's employ for about two years, beginning in June 1979, but was asked to come back (Tr. 58-60).

Mr. Vigne stated that while Mr. Dibble mentioned a job in the scale house to him after he was terminated, he was not formally offered the job, and he conceded that he was not interested in the position. He denied that Mr. Haire ever mentioned that job to him, and he also denied that he turned down Mr. Haire's offer to work in the scale house (Tr. 63).

Testimony Presented by the Respondent

Anthony T. Haire, respondent's General Mine Superintendent, testified that he assumed supervisory authority over the dry plant on February 19, 1983, and that he discussed several problems with the plant operations with Mr. Vigne. These problems included closer supervision over the men, updating and cleaning the plant, and a desire to increase production. Mr. Haire stated he told Mr. Vigne that he should spend less time in his office and more time supervising and being with his men (Tr. 65-68).

Mr. Haire stated that after his conversations with Mr. Vigne, his work performance did not improve, and production did not increase significantly. He had further discussions with Mr. Vigne, and when he visited the plant Mr. Haire found that men were engaging in horseplay, and that the plant was not kept clean, and broken bags of material were "strung around the plant" (Tr. 70). When asked about Mr. Vigne's reactions to his instructions, Mr. Haire stated as follows (Tr. 70-72):

A. Well, the favorite thing was that I'm not going to do any manual work. He said he was hired as a supervisor and I tried to explain to him, which I did several times, that Gall is a small operation, and that everybody works. I work with any department that needs me, if I got to get out there, and whatever it takes to get something done, I do it.

Q. You do physical labor?

A. Yes, I do.

Q. Do any of the other department foremen do physical labor?

A. Yes, they do.

\* \* \*

Q. When you had these early conversations with Mr. Vigne right after you took over, did you explain to him that you wanted him to be a working foreman like your other foremen?

A. I didn't actually tell him to get over there and get with it, you know, I mean if the manpower is there to do the job, if all his help is there in a day's time, then there is no need for him to actually get over there and do bodily labor, no.

But I expected him to be there, you know, walk through every once in a while and check and make sure that work is being done properly.

Q. And he wasn't doing that?

A. No, he was -- he would go over there, yes, but once or twice a day. And that's quite a long time when you got production to get out.

Q. And he wasn't doing that?

A. No, he was -- he would go over there, yes, but once or twice a day. And that's quite a long time when you got production to get out.

Q. Okay.

A. But if men would not show up we would have a tardy -- I'm shorthanded, I can't get much today, which that was no good for production because like I way, we're small people. If need be, I can try to pull a person from another department to fill in if I can, but I can't always do that.

Q. So if Mr. Vigne was shorthanded he didn't pitch in and help?

A. No, sir.

Q. Did production suffer as a result of that?

A. Yes, sir, it did.

Mr. Haire confirmed that he asked Mr. Vigne to paint the legs of the hopper silo, and that he did so after finding him on numerous occasions sitting in his office reading books (Tr. 75). Mr. Haire stated that Mr. Vigne refused to do any painting because "he figured he was above it" (Tr. 75). Mr. Haire stated that Mr. Vigne's refusal to paint was not the cause for his termination, and that he was terminated because of low production, his inability to get his men to work and get the work done (Tr. 75).

Mr. Haire stated that Mr. Vigne's prior supervisor, Charlie Meadows, disciplined him for poor supervision. Mr. Haire identified exhibit R-1, as a May 29, 1979, document which was placed in Mr. Vigne's personnel file, and he indicated that it instructed Mr. Vigne as to how to perform his job "step-by-step" (Tr. 76).

Mr. Haire confirmed that MSHA conducted an inspection at the dry plant, beginning on March 2, 1983, and that 12 out of 13 total citations concerned conditions in the dry plant. Two citations were guarding citations for which civil penalties were assessed. Mr. Haire indicated that he shut the operation down, and that all of the citations were abated within eight hours (Tr. 86-87).

Mr. Haire confirmed that Mr. Vigne had submitted "work orders" for the two guarding citations, but that he had not submitted any for the conditions cited in the other 10 citations, nor had he brought these conditions to his attention, or to the attention of anyone else (Tr. 88). Mr. Haire stated that Mr. Vigne was not required to submit any work orders to correct the conditions cited as guarding violations, and that he had the authority to get a welder to do the work (Tr. 89-90). Mr. Haire denied that Mr. Vigne was terminated because he issued work orders pertaining to the guards, or because he informed Inspector Richardson of this fact (Tr. 90-91). He also denied that the inspection had anything to do with Mr. Vigne's termination (Tr. 91).

Mr. Haire stated that after he informed Mr. Vigne that he was to be terminated, he offered him a job in the scale house, but Mr. Vigne refused it. Mr. Haire also indicated that he tried to get him a job in a hardware store operated by the respondent, but there were no openings (Tr. 93).

Mr. Haire stated that he has never met Inspector Weaver, but that he does know Inspector Richardson (Tr. 120). He confirmed that when he terminated Mr. Vigne he did not discuss the MSHA citations with him, nor did he mention that he was displeased with the fact that the citations may have resulted from Mr. Vigne's shortcomings (Tr. 125).

Mr. Haire confirmed that Mr. Vigne did not contact Inspector Richardson to come to the plant to conduct an inspection (Tr. 127). Mr. Haire also confirmed that he was with Inspector Richardson at the time the citations issued, and that Mr. Vigne was also present (Tr. 129).

Mr. Haire stated that Mr. Vigne was not given any written notice of termination, and that the offer made to him for the scale house job would not have been a significant reduction in pay (Tr. 133-134).

Donald R. Bridges, respondent's Dry Plant Foreman, testified as to his duties and responsibilities, and he stated that when he was operating the scales two truck drivers complained to him that there was not enough sand ready for loading and that this was Mr. Vigne's responsibility (Tr. 137-141). He also indicated that when he was the dry plant foreman, he had the authority to fix any equipment which posed a safety problem without writing a work order (Tr. 141).

On cross-examination, Mr. Bridges conceded that there were times when Mr. Vigne requested a loader that he had

to wait at least 40 minutes for this service (Tr. 143). Mr. Bridges denied that he ever threatened Mr. Vigne with harm if he complained to Mr. Dibble about the lack of a loader (Tr. 143-144).

Mr. Vigne was recalled as the Court's witness, and he confirmed that Mr. Haire never held him personally accountable for the citations which were issued by Inspector Richardson and that he (Vigne) never complained to Mr. Richardson, but simply showed him the work orders which he had submitted for the abatement work to be done (Tr. 149). He also confirmed that at no time did he contact MSHA to complain about any of the conditions which resulted in the issuance of the citations (Tr. 150).

Mr. Vigne examined his "Personnel Envelope File" which was produced by the respondent's counsel, and he confirmed that it was in fact his personnel file maintained by the respondent. He confirmed that in connection with an unemployment compensation claim which he filed when he left the respondent's employ in 1979, he indicated that he quit his job because of a salary dispute with his supervisor, and that this was true (Tr. 150-152).

With regard to his unemployment compensation claim which he filed in connection with his May 6, 1983, termination, Mr. Vigne confirmed the accuracy of a statement on a form completed by the respondent that he was discharged because of a "disagreement over job duties" with his "new supervisor." He also confirmed that the disagreement concerned Mr. Haire's desire that he perform "labor tasks" and his (Vigne's) disagreement over this issue (Tr. 154). Mr. Vigne also confirmed the accuracy of the following statement which was included on the form submitted by the respondent in connection with his unemployment compensation claim (Tr. 155):

While under new supervision, Mr. Vigne was instructed on the new routine to be maintained at the drying processing plant. He failed to comply with these instructions and would not work as a laborer, since he was hired as the foreman. After this conversation he was asked to terminate his employment.

Mr. Vigne confirmed that the aforesaid characterization of the circumstances under which he was terminated were accurate (Tr. 157), and he reiterated that he did not believe that Mr. Haire was aware of the fact that he had spoken to Inspector Richardson about the citations which he issued (Tr. 172).

The information provided by Mr. Vigne in connection with his unemployment claim, reflects an initial determination made by a claims adjudicator on May 27, 1983, in which it was found that Mr. Vigne was discharged "for failure to comply with supervisory instructions." The adjudicator concluded that this amounted to "misconduct connected with work," which disqualified Mr. Vigne from receiving unemployment benefits.

On appeal of the adjudicator's decision, the referee reversed the adjudicator's determination, and ruled that Mr. Vigne's refusal to do manual work, as directed to by his supervisor, was justified. The referee found that since Mr. Vigne had been doing supervisory work in the past, it was unreasonable to expect him to do manual labor at hourly wages, and that since this was tantamount to a "demotion," Mr. Vigne had good cause to refuse his supervisor. Accordingly, while the referee found that Mr. Vigne had in fact been discharged, he ruled that the discharge was not "for misconduct connected with his work," and he reversed the adjudicator's conclusion in this regard.

Respondent produced copies of two documents filed in connection with unemployment compensation claims filed by Mr. Vigne while employed with the respondent. One document is the form completed at the time Mr. Vigne applied for benefits when he was terminated in May 1983 (Tr. 154-155). The form contains a statement by Mr. Vigne that he was discharged because "new supervisor and I had disagreement over job duties." The second document is a State of Florida Notice of Claims Determination, dated June 28, 1979, which advises Mr. Vigne that he is disqualified for certain unemployment because he quit his job because of a conflict with his supervisor, and that his quitting was without good cause attributable to his employer.

#### Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co. v. Marshall, 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by

showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this matter it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Maga Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983); and Donovan v. Stafford Construction Co., Nos. 83-1566, D.C. Cir. (April 20, 1984) (specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., \_\_\_ U.S. \_\_\_, 76 L. Ed. 2d 667 (1983).

On the facts presented in this proceeding, I cannot conclude that there is any credible evidence to suggest or support any theory that Mr. Vigne's discharge was in any way connected with any protected activity on his part. There is no evidence of any protected work refusals or retaliation for such activity, nor is there any evidence that Mr. Vigne made any safety complaints to mine management, to MSHA, or to any state or local mining authorities. The thrust of Mr. Vigne's case seems to be that when an MSHA inspector inspected the mine following a previous "courtesy visit" by another inspector, Mr. Vigne "cooperated" with the inspector, and pointed out certain safety infractions to him. In addition, Mr. Vigne asserted that when questioned by the inspector as to why the cited conditions had not been corrected, Mr. Vigne advised him that he had submitted certain "work orders" to correct the conditions, but had been unsuccessful. After the inspector issued certain citations charging the respondent with several violations, Mr. Vigne suggests that Mr. Haire was somehow offended, and retaliated by firing him.

Mr. Vigne conceded that at the time he was informed that he was going to be fired, there were no discussions about any MSHA inspections, and Mr. Haire never mentioned them. Mr. Vigne also conceded that even if he had not mentioned the work orders, Inspector Richardson would have issued the citations anyway. Given the fact that the conditions which prompted the citations issued by Inspector Richardson were

initially discovered by Inspector Weaver and called to Mr. Vigne's attention, I cannot conclude that Mr. Vigne was cast in the role as the one who initiated the inspection or that his complaints prompted the issuance of the citations. Since Mr. Vigne was the supervisor responsible for the area where some of the conditions were cited, I believe it was only natural for him to attempt to mitigate his own responsibility for the conditions by bringing the work orders to the attention of the Inspector. Mr. Haire testified that he was aware of only two work orders concerning equipment guards, and he denied any knowledge of other work orders submitted by Mr. Vigne, and indicated that Mr. Vigne never discussed them with him. Mr. Vigne admitted that he never mentioned any of his conversations with Inspector Richardson to Mr. Haire or others in mine management, and he admitted that as a supervisor, he had a responsibility for safety conditions in those area under his supervision.

The record in this case strongly suggests that Mr. Vigne and certain individuals in mine management did not get along too well. Mr. Vigne conceded that his work had been the subject of past criticism by a superior, and while he indicated that he left the respondent's employ voluntarily on a previous occasion and was then asked to return, the fact is that he was gone for approximately two years and that his departure came after some conflict with his supervisor.

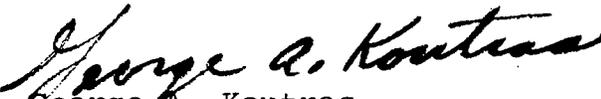
With regard to Mr. Vigne's termination in April 1983, I find nothing here to support a conclusion that Mr. Vigne was fired for exercising any protected safety rights. Having viewed Mr. Vigne and Mr. Haire during the course of their testimony in this case, including their demeanor and temperament, I am clearly convinced that they have a personal dislike for each other. I am also convinced that Mr. Haire was not too enchanted with Mr. Vigne's work performance and attitude toward his work when he assumed supervisory responsibilities over him. I am also convinced that Mr. Vigne resented Mr. Haire's supervisory authority, and resisted efforts by Mr. Haire to assign work to him which Mr. Vigne found demeaning to his status as a supervisor. Although Mr. Vigne may have been justified in resisting Mr. Haire's attempts to assign him other work, that is a matter best left to mine management. Since Mr. Vigne was a supervisor and part of mine management, and absent any evidence that any protected rights under the Mine Act have been violated, I believe that any difficulties encountered by Mr. Vigne with an upper echelon supervisor of this rather small company is a private matter best left for resolution by those parties.

I take particular note of Mr. Vigne's testimony concerning the circumstances surrounding the discharge in issue in this case. In a statement attributed to Mr. Vigne which appears on a state unemployment compensation form, he purportedly stated that "new supervisor and I had disagreement over job duties," and that this was the reason he gave for his discharge. During the hearing, Mr. Vigne acknowledged the accuracy of this statement, as well as another statement indicating that his discharge resulted from his failure to comply with instructions from his supervisor over work assignments. In both instances, Mr. Vigne admitted that the supervisor in question was Mr. Haire. Under the circumstances, these admissions by Mr. Vigne, made shortly after his discharge, strongly support the conclusion that his discharge was prompted by his inability to get along with Mr. Haire, and his failure to follow Mr. Haire's instructions and orders concerning his work.

The fact that Mr. Vigne ultimately prevailed on his claim for unemployment compensation before the State of Florida is not relevant in this case before me. Although the unemployment referee concluded that Mr. Vigne's refusal to follow Mr. Haire's instructions concerning his work did not amount to "misconduct" for purposes of disqualifying him for benefits, his conclusion in this regard is not controlling to the facts presented in the case before me. The issue before me is whether Mr. Vigne's discharge was in any way connected with or prompted by, the exercise of any protected safety rights he had under the Federal mine safety and health law. I have concluded that it was not.

#### Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the complainant here was failed to establish a prima facie case of discrimination on the part of the respondent. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

  
George A. Koutras  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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NOV 16 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 84-122  
Petitioner : A.C. No. 46-03138-03513  
v. :  
ZAPATA COAL CORPORATION, : Docket No. WEVA 84-123  
Respondent : A.C. No. 46-03138-03514  
: Docket No. WEVA 84-149  
: A.C. No. 46-03138-03515  
:  
: Monclo Prep. Plant  
: Boone No. 2 Prep. Plant  
:  
ZAPATA COAL CORPORATION, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. WEVA 84-17-R  
: Citation No. 2139599; 10/17/83  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. WEVA 84-18-R  
ADMINISTRATION (MSHA), : Citation No. 2139587; 10/6/83  
Respondent :  
: Docket No. WEVA 84-19-R  
: Citation No. 2139593; 10/11/83  
:  
: Docket No. WEVA 84-20-R  
: Citation No. 2139597; 10/12/83  
:  
: Docket No. WEVA 84-21-R  
: Citation No. 2271717; 10/12/83  
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: Docket No. WEVA 84-22-R  
: Citation No. 2139563; 10/18/83  
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: Docket No. WEVA 84-23-R  
: Citation No. 2139600; 10/18/83  
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: Docket No. WEVA 84-24-R  
: Citation No. 2139561; 10/18/83  
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: Docket No. WEVA 84-25-R  
: Citation No. 2271718; 10/19/83

: Docket No. WEVA 84-26-R  
: Citation No. 2271719; 10/19/83  
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: Docket No. WEVA 84-27-R  
: Citation No. 2271720; 10/19/83  
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: Docket No. WEVA 84-28-R  
: Citation No. 2271722; 10/19/83  
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: Docket No. WEVA 84-29-R  
: Citation No. 2271726; 10/20/83  
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: Docket No. WEVA 84-36-R  
: Citation No. 2139562; 10/18/83  
:  
: Docket No. WEVA 84-37-R  
: Citation No. 2271724; 10/20/83  
:  
: Monclo Prep. Plant  
: Boone No. 2 Prep. Plant

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner/Respondent;  
Laura E. Beverage, Esq., Jackson, Kelly, Holt  
and O'Farrell, Charleston, West Virginia, for  
Respondent/Contestant.

Before: Judge Broderick

STATEMENT OF THE CASE

The mine operator (Zapata) filed proceedings contesting the validity of citations issued by MSHA. The Secretary has filed penalty proposals for the violations of mandatory standards alleged in the contested citations. The proceedings were consolidated by Order of May 11, 1984, for the purposes of hearing and decision. With respect to certain of the violations, the parties submitted prior to the hearing and at the hearing, settlement proposals. Pursuant to notice, the consolidated cases were heard on the merits in Charleston, West Virginia, on September 18 and 19, 1984. Federal Mine Inspectors Ernest Thompson and Clinton Lewis testified on behalf of MSHA. J. Richard Dillon, Monty Boytek, and Hershel Aylshire testified on behalf of Zapata. The parties waived their rights to file posthearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

## FINDINGS AND CONCLUSIONS APPLICABLE TO ALL CITATIONS

1. At all times pertinent to these proceedings, Zapata Coal Corporation, also known as Dal-Tex Coal Corporation, was the owner of mining facilities in Logan County, West Virginia, known as the Monclo Prep. Plant, also known as Boone No. 2 Prep. Plant.

2. At the time of the alleged violations contested in these proceedings, the annual production of the subject mine was 557,122 tons of coal. The operator is therefore of moderate size.

3. In the 24-months prior to the alleged violations contested herein, the operator had a history of 66 violations of mandatory standards. This is a relatively favorable history.

4. The imposition of penalties in these proceedings will not affect the operator's ability to continue in business.

5. All of the violations involved herein were abated promptly and in good faith.

6. The operator herein is subject to the provisions of the Federal Mine Safety and Health Act of 1977 in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

## SETTLEMENT MOTION

The Secretary proposed to settle certain of the alleged violations contained in the above dockets. Written motions were filed on July 2, 1984, and August 27, 1984, and were amended by statements made on the record on September 19, 1984. The following citations were included in the motions:

Docket No. WEVA 84-122

Citation No. 2271720

This citation charged a violation of 30 C.F.R. § 77.400(b) because of the absence of a guard on a walkway under the conveyor belt. The hazard was deemed minimal and the operator's negligence moderate. The violation was originally assessed at \$20 and the parties proposed to settle for \$40. I approved the settlement agreement.

Citation No. 2271722

This citation charged a violation of 30 C.F.R. § 77.204 because handrails and toeboards were inadequate or were missing under the rotary dump, on the bottom floor transfer building, and around the second floor of the shaker. The hazard was deemed moderate as was the operator's negligence. The violation was originally assessed at \$136, and the parties proposed to settle for \$136. I approved the settlement agreement.

Docket No. WEVA 84-123

Citation No. 2139561

This citation charged a violation of 30 C.F.R. § 77.204 because of openings caused by deteriorated metal on the first floor of the preparation plant. The hazard was deemed moderate as was the operator's negligence. The violation was originally assessed at \$105 and the parties proposed to settle for \$105. I approved the settlement agreement.

Citation No. 2139562

This citation charged a violation of 30 C.F.R. § 77.1607(c) because the unguarded walkway along the belt conveyor was not equipped with emergency stop devices or cords. The hazard was deemed unlikely to occur, but the operator's negligence was deemed moderate. The violation was originally assessed at \$20, and the parties proposed to settle for \$40. I approved the settlement agreement.

Citation No. 2271726

This citation charged a violation of 30 C.F.R. § 77.400 because the equipment guard for the V-belt pulley was inadequate. The gravity of the hazard was deemed moderate, but the operator's negligence was deemed low. The violation was originally assessed at \$105, and the parties proposed to settle for \$90. I approved the settlement agreement.

Docket No. WEVA 84-149

Docket No. 2139587

This citation charged a violation of 30 C.F.R. § 71.805 because a noise survey showed excessive noise in the environment of one miner. The gravity of the violation was deemed low and the operator's negligence minimal. The violation was originally assessed at \$98 and the parties proposed to settle for \$69. I approved the settlement agreement.

Citation No. 2139593

This citation charged a violation of 30 C.F.R. § 77.1104 because of an accumulation of combustible material along a portion of the mine floor. The condition had recently occurred, consisted of wet material and was not a serious hazard. The violation was originally assessed at \$20, and the parties proposed to settle for \$40. I approved the settlement agreement.

Citation No. 2139563

This citation charged a violation of 30 C.F.R. § 77.207 because of insufficient illumination along a number of walkways. No miners worked in the area, however, and the operator's negligence was deemed low. The violation was originally assessed at \$105 and the parties proposed to settle for \$69. I approved the settlement agreement.

THE CONTESTED CITATIONS

Docket No. WEVA 84-122

Citation No. 2139597

This citation charged a violation of 30 C.F.R. § 77.207 because of inadequate illumination along a walkway which constituted a secondary escapeway. There were lights on the primary escapeway, on the landing, and flood lights on the hill at the stockpile about 50 feet from the secondary escapeway. The operator's safety superintendent testified that all of these lights provided illumination to the secondary escapeway. The citation was written in the daytime, although the inspector testified that he had previously been in the area at night. The operator's safety superintendent testified that he frequently walked the secondary escapeway, and in his opinion it was adequately illuminated. There was debris along the walkway.

I conclude that the Secretary has not carried his burden of establishing that a violation occurred. Therefore, the notice of contest is granted, the citation is VACATED, and the penalty proposal for this violation is DISMISSED.

Citation No. 2271717

This citation charged a violation of 30 C.F.R. § 77.202 because of an accumulation of float coal dust on the surface structure of a coal truck dump, on the inside of the frame of an electric heater and in the electrical control boxes

and switch boxes. Sources of ignition were present in the electrical connections and in the cable from the pump which lacked proper bushing. The pump and heaters were not in operation at the time the citation was issued.

The inspector and the operator's plant superintendent disagreed as to whether the dust on the facilities described above was float coal dust. I accept the inspector's testimony on this issue and conclude that float dust was present in the amounts described by the inspector. The amount of dust was such that it would have taken more than one shift to accumulate. With an ignition source present, there was a substantial fire or explosion hazard. I find that coal dust in a dangerous amount was permitted to accumulate. Therefore, the cited condition was a violation of the standard in 30 C.F.R. § 77.202. It was a significant and substantial violation, was serious and was caused by the operator's negligence. I conclude that \$250 is an appropriate penalty for the violation.

Citation No. 2139600

This citation charged a violation of 30 C.F.R. § 77.400(c) because of an inadequate guard at the No. 9 belt conveyor flight discharge head. The inspector stated that a miner could reach in behind the guard and catch himself between the belt and the pulley. There were no miners working at the drive at the time the citation was issued, but the belt was regularly cleaned and serviced while the belt was in operation. The guard was only about 48 inches high. The distance from the top portion of the guard to the pinch point was 31 to 36 inches. It would have been somewhat difficult but not impossible for a person to reach the pinch point from behind the guard. The standard requires that guards shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. The Commission recently held that this standard "imports the concepts of reasonable possibility of contact and injury; including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." Secretary v. Thompson Brothers, 5 FMSHRC \_\_\_\_ (September 24, 1984), slip. op. page 4. I conclude that a violation of the standard was established. However, I further conclude that an injury was unlikely because of the location of the pinch point. The violation was not significant and substantial and was not serious. The condition was or should have been obvious to the operator and therefore, resulted from the operator's negligence. I conclude that an appropriate penalty for the violation is \$75.

Citation No. 2271718

This citation charged a violation of 30 C.F.R. § 77.400(a) because of inadequate mechanical equipment guards at the rotary breaker and at 4 V-belts at the pulley drive shaker. There was an opening about 18 inches wide in the screen guard at the rotary breaker which was from 6 to 7 feet high. The pinch point was about 26 inches in from the guard. The guards on the 4 V-belts did not come down to the end of the motor, leaving the belts and pinch points exposed. The area of exposure was about 4 inches high and 4 inches wide. The pinch point was 18 to 20 inches in from the guard, and about 5-1/2 feet high. The area was cleaned weekly and serviced occasionally.

I conclude that a violation of the standard (requiring that exposed moving machinery parts which may be contacted by persons and may cause injury to persons shall be guarded) was shown. See discussion of prior citation, above. I conclude that the violation was reasonably likely to cause serious injury; that therefore, it was significant and substantial. The conditions should have been known to the operator. I conclude that an appropriate penalty for the violation is \$150.

Docket No. WEVA 84-123

Citation No. 2139599

This citation charged a violation of 30 C.F.R. 77.1608(b) because of dumping of coal approximately 30 feet beyond the edge of a high wall and directly above a surge bin; and also because an end loader was trammed above the surge bin to scatter coal dumped by trucks. The standard requires that where the ground at a dumping point may fail to support the weight of a loaded dump truck, trucks shall be dumped a safe distance back from the edge of the bank. The evidence is conflicting as to whether the ground was such that it could support the weight of a loaded truck. There was considerable dispute as to the effect (and location) of the surge bin. I accept the judgment of the inspectors that the ground at the dumping point in question might fail to support the weight of a loaded truck. I further accept their testimony as to the evidence that trucks had backed on to such ground. The trucks belonged to and were operated by independent trucking companies. But the

operator here controlled the dumping area, and was responsible for controlling the dumping of the coal. I conclude that the operator was properly cited for violations of the standard committed by the truckers. Therefore, I conclude that a violation was established. I further conclude, as the Secretary concedes, that the end loader's travel on to the coal pile was not a violation of the standard cited. I further conclude that the trucks did not go out over the surge bin, although they did go beyond the edge of the highwall. Respondent did not take adequate steps to prevent this occurrence and was therefore negligent in permitting the violation. I conclude that the violation was reasonably likely to result in serious injury. It was therefore properly cited as significant and substantial. I conclude that an appropriate penalty for the violation is \$150.

Citation No. 2271719

This citation charged a violation of 30 C.F.R. § 77.202 because of float coal dust accumulations to a depth of 4 inches on the frame and structure of the speed reducer in the Transfer Building. The speed reducer contains an electrical motor and belt drive. The motor was energized and the belt was in operation at the time the citation was issued. The amount of dust was such that it would have taken more than one shift to accumulate. The electric motor and speed reducer do not generally get hot but run warm while in operation. The building was enclosed on three sides and open on the fourth. The only miners normally entering the area would be those assigned to grease the bearings and clean up the area. I conclude that the accumulation of float coal dust was a violation of the standard cited. I further conclude that since ignition sources were present, it was reasonably likely to contribute to a fire or explosion hazard which could result in serious injury to miners, and that it resulted from the operator's negligence. I conclude that an appropriate penalty for the violation is \$135.

Citation No. 2271724

This citation charged a violation of 30 C.F.R. § 77.512 because of covers not being properly secured on three breaker boxes serving the centrifugal dryers. The boxes have 480 volts of power. The power was on and the tippie in operation. The only people authorized to enter the area are certified electricians and foremen. A danger sign was present on the door warning of 480 volts of electricity. The screw locks were loose and the doors open about 2 to 3 inches. I conclude that a violation was established. The condition

should have been known to the operator and corrected before the citation was issued. The exposure to hazard was minimal and the likelihood of injury slight. The violation was not significant and substantial. I conclude that an appropriate penalty for the violation is \$75.

ORDER

1. The following contested citation is ORDERED VACATED:

Citation No. 2139597 issued October 12, 1983

2. The following contested citations are ORDERED AFFIRMED, but MODIFIED to remove the significant and substantial designation:

Citation No. 2139600 issued October 18, 1983

Citation No. 2271724 issued October 20, 1983

3. The following contested citations are AFFIRMED as issued:

Citation No. 2271717 issued October 12, 1983

Citation No. 2271718 issued October 19, 1983

Citation No. 2139599 issued October 17, 1983

Citation No. 2271719 issued October 19, 1983

4. As part of the settlement, the operator seeks to have withdrawn its notices of contest with respect to the following citations and the contests are ORDERED WITHDRAWN and the proceedings DISMISSED:

Citation No. 2271720 issued October 19, 1983

Citation No. 2271722 issued October 19, 1983

Citation No. 2139561 issued October 18, 1983

Citation No. 2139562 issued October 18, 1983

Citation No. 2271726 issued October 20, 1983

Citation No. 2139587 issued October 6, 1983

Citation No. 2139563 issued October 18, 1983

Citation No. 2139593 issued October 11, 1983

5. Within 30 days of the date of this decision the operator is ORDERED to pay the following civil penalties for violations of mandatory standards:

<u>CITATION</u>	<u>PENALTY</u>
2271720	\$ 40
2271722	136
2139561	105
2139562	40
2271726	90

2139587	69
2139593	40
2139563	69
2139597	0
2271717	250
2139600	75
2271718	150
2139599	150
2271719	135
2271724	75
Total	<u>\$1,424</u>

*James A Broderick*  
 James A. Broderick  
 Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

NOV 19 1984

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
ON BEHALF OF	:	
I. B. ACTON	:	Docket No. SE 84-31-D
GRADY ADERHOLT	:	SE 84-32-D
FREEMAN BUTLER	:	SE 84-33-D
JAMES L. CAMPBELL	:	SE 84-34-D
W. D. FRANKLIN	:	SE 84-36-D
BILLY R. GLOVER	:	SE 84-37-D
TERRY PEOPLES	:	SE 84-39-D
WILLIAM REID	:	SE 84-40-D
CHARLES W. RICKER	:	SE 84-41-D
TERRY SHUBERT	:	SE 84-42-D
THEODORE TAYLOR	:	SE 84-43-D
MARVIN WISE	:	SE 84-44-D
	:	
	:	MSHA Case No. BARB CD 83-18
	:	
	:	Nebo Mine
	:	
ROBERT BURLESON	:	Docket No. SE 84-46-D
Complainants	:	
	:	MSHA Case No. BARB CD 83-28
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	No. 7 Mine
Intervenor	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;  
Mary Lu Jordan, Esq., Washington, D.C., for Intervenor;  
David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama, and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama, for Respondent.

Before: Judge Melick

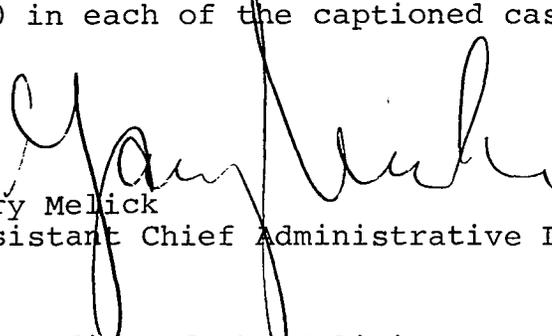
A. Final Disposition of Discrimination Proceedings:

By decision dated October 15, 1984, any claim for interest and attorney's fees in these cases was to be submitted to the undersigned within 20 days thereof. No such claim has been filed and no extension of time requested. Accordingly the Complainants are awarded only the training expenses and comparable wages set forth in that decision. Jim Walter Resources, Inc., is hereby ordered to pay the noted amounts to the following miners within 10 days of the date of this decision:

<u>Name of Miner</u>	<u>Total Due</u>
I. B. Acton	\$523.48
Grady Aderholt	485.54
R. Burleson	528.74
F. Butler	418.40
J. L. Campbell	493.88
W. D. Franklin	437.54
R. B. Glover	429.86
T. Peoples	436.54
W. C. Reid	425.86
C. W. Ricker	500.00
T. Shubert	420.14
T. Taylor	439.74
M. Wise	404.86

B. Final Disposition of Civil Penalty Proceedings:

In accordance with the decision in these cases dated October 15, 1984, Jim Walter Resources, Inc., is hereby ordered to pay within 10 days of the date of this decision a civil penalty of \$650 (\$50 in each of the captioned cases).

  
Gary Mellick  
Assistant Chief Administrative Law Judge

Distribution:

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Robert W. Pollard, Esq., Jim Walter Resources, Inc., P.O. Box C-79, Birmingham, AL 35283 (Certified Mail)

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

NOV 20 1984

PEABODY COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. KENT 84-97-R  
: Citation No. 2338145; 1/16/84  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. KENT 84-98-R  
ADMINISTRATION (MSHA), : Citation No. 2338146; 1/16/84  
Respondent :  
: Docket No. KENT 84-99-R  
: Citation No. 2338147; 1/16/84  
: :  
: Docket No. KENT 84-100-R  
: Citation No. 2338148; 1/20/84  
: :  
: Docket No. KENT 84-101-R  
: Citation No. 2338151; 1/20/84  
: :  
: Docket No. KENT 84-102-R  
: Citation No. 2338153; 1/20/84  
: :  
: Docket No. KENT 84-104-R  
: Citation No. 2338156; 1/23/84  
: :  
: Docket No. KENT 84-105-R  
: Citation No. 2338157; 1/23/84  
: :  
: Docket No. KENT 84-106-R  
: Citation No. 2338158; 1/25/84  
: :  
: Docket No. KENT 84-107-R  
: Citation No. 2338703; 1/30/84  
: :  
: Docket No. KENT 84-117-R  
: Citation No. 2338710; 2/03/84  
: :  
: Docket No. KENT 84-118-R  
: Order No. 2338711; 2/03/84  
: :  
: Docket No. KENT 84-119-R  
: Order No. 2338712; 2/03/84  
: :  
: Camp No. 2 Underground Mine  
:

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 83-133
Petitioner	:	A.C. No. 15-02705-03537
v.	:	
	:	Docket No. KENT 84-149
PEABODY COAL COMPANY,	:	A.C. No. 15-02705-03539
Respondent	:	
	:	Docket No. KENT 84-223
	:	A.C. No. 15-02705-03544
	:	
	:	Camp No. 2 Mine

DECISION

Appearances: Michael O. McKown, Esq., St. Louis, Missouri, for Contestant/Respondent;  
Deborah A. Persico, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent/Petitioner.

Before: Judge Melick

These consolidated cases are before me pursuant to sections 105(a) and 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to contest citations and withdrawal orders issued to the Peabody Coal Company (Peabody) and for review of civil penalties proposed by the Mine Safety and Health Administration (MSHA), for the violations alleged therein. At hearing, Peabody admitted the existence of the violations and the special unwarrantable failure findings (as alleged in the two orders before me) and challenged only the "significant and substantial" findings made by MSHA.

In order to establish that a violation of a mandatory safety standard is "significant and substantial" the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984).

With the exception of Citation No. 2338155 which had been the subject of a settlement and final disposition prior to the filing by the Secretary of the civil penalty proceedings now before me (Docket No. KENT 84-149), all of the citations and orders at issue involve a violation of the permissibility requirements set forth in the standard at 30 C.F.R.

§ 75.503. The admitted violations all concern openings in excess of .004 of an inch between plain flange cover plates and electrical enclosures on electrical face equipment taken or used in by the last open crosscut. Several of the citations/orders allege, in addition, other electrical hazards charging independent violations of the cited standard. The corresponding citations and orders are noted in the discussion that follows.

In determining whether the violations are "significant and substantial" several factors are relevant to all of the alleged violations. In this regard it is not disputed that each of the cited pieces of equipment was being used, or would have been used in the near future, in by the last open crosscut and in close proximity to working faces. In addition, within the cited electrical compartments sparking and arcing were frequent and sufficient to ignite a methane concentration in the atmosphere of between 3 percent and 15 percent. Further, that during the time the violations were cited ventilation in excess of that required by the operator's ventilation plan and an amount deemed adequate by MSHA was ventilating relevant face areas; that there had been adequate rock dusting in relevant areas; that in many of the units in which the citations were issued no methane was detected and in none of the units was more than .8 percent methane found; and that methane checks were made at least every 20 minutes.

According to MSHA Inspector George Dupree, the violations were "significant and substantial" because of the danger of fire and explosion which could be triggered by concentrations of methane between 3 percent and 15 percent entering electrical compartments in which sparking and arcing occurs. While conceding that there had been little or no evidence of methane and recognizing the apparent adequacy of the ventilation, rock dusting and methane testing at the time of these violations, Dupree nevertheless noted that methane in explosive concentrations can be liberated at any time and indeed at the mine cited in this case, he observed significant fluctuations in methane liberation. The exhibits in evidence depicting variations in methane liberation at the Camp No. 2 Mine support the inspector's testimony in this regard. In further support of his estimation of the hazard presented, Dupree cited MSHA records of fatal methane explosions in mines with no history of methane..

In addition, in light of the large number of similar violations and, indeed, of the continuing violations after warnings from the MSHA inspector, it is reasonable to infer that, in the normal course of events, the cited conditions would not have been corrected. Within this framework of

evidence, it is apparent that the violations are indeed "significant and substantial." See Secretary v. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866 (1984) affirming similar "significant and substantial" violations of the permissibility standards. The violations were in any event also "significant and substantial" based on the uncontested evidence that electrical shock and electrocution were reasonably likely from water seepage into the cited electrical compartments and the resulting short circuiting.

While there is also evidence that some of the equipment was furnished with methane monitors which, if properly functioning, will trigger a warning light at a 1 percent concentration of methane and cut off power to the equipment upon the presence of 2 percent methane, it is not disputed that these monitors can and do malfunction. Explosive concentrations of methane could also reach the exposed electrical compartments before reaching the methane monitor. Under the circumstances, I do not find the existence of methane monitors to be sufficient to negate the "significant and substantial" findings made herein.

According to Inspector Dupree, the large number of permissibility violations at the Camp No. 2 Mine was quite unusual and reflected a totally inadequate maintenance program. Indeed, Dupree found that 70 percent of the violations were the result of loose bolts on the cover plates. Moreover, even after several permissibility violations were cited on the first day of his inspection, thereby giving notice to the mine operator of this deficiency, the violations nevertheless continued. I agree with Dupree's evaluation and I conclude that these factors warrant a finding of significant negligence. In addition, with respect to Citation Nos. 2338143, 2338144, 2338145, 2338147, 2338151, 2338153, 2338156, 2338157, 2338703, and 2338710, and Order No. 2338711, the undisputed evidence is that the bolts and lock washers holding the cover plates onto the electrical compartments were loose, protruding, and clearly visible. It could reasonably be inferred from these obvious conditions that the cover plates were also loose, unsafe, and in violation of the cited standard. Accordingly, for this additional reason, I find that the noted violations were the result of significant negligence.

In addition, with respect to Citation No. 2338146, it is undisputed that the cover plate over the electrical compartment had rusted to such an extent that the cover had to be replaced. It is further undisputed that the amount of rust observed could have accumulated only after a lapse of 3 or 4 months. Accordingly, the deteriorated condition should have been detected during the weekly electrical inspections. Therefore it may reasonably be inferred that

those electrical inspections were not being adequately performed. The violation was thus the result of significant negligence.

Finally, with respect to Order No. 2338712, it is undisputed that, in addition to the cited loose cover plate, the conduit and cable had been torn out of the resistor panel, thereby creating an independent hazard. The condition was readily visible, since the light was inoperative, and was therefore the result of gross negligence.

Further negligence is attributable to the operator in those cases cited after January 16, 1984, since the mine operator was forewarned on that date of the recurrent problem of these permissibility violations. It is apparent that even after these warnings management took no effective corrective action. Accordingly, I am assessing a greater penalty for the corresponding citations and orders.

In determining the amount of penalties to be assessed in these cases, I have also considered that the operator is large in size and has a substantial history of violations including a number of violations of the standard cited herein. The violations were all abated in a timely and good faith manner.

#### ORDER

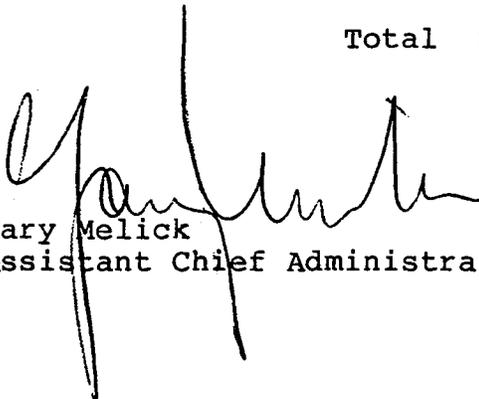
Citation No. 2338155 having been previously withdrawn before the filing of the instant civil penalty proceeding is hereby severed from these cases. The contest proceedings, Dockets No. KENT 84-97-R, KENT 84-98-R, KENT 84-99-R, KENT 84-100-R, KENT 84-101-R, KENT 84-102-R, KENT 84-104-R, KENT 84-105-R, KENT 84-106-R, KENT 84-107-R, KENT 84-117-R, KENT 84-118-R, and KENT 84-119-R are dismissed.

The Peabody Coal Company is ordered to pay the following civil penalties within 30 days of the date of this decision:

Citation No. 2338142	\$ 100
Citation No. 2338143	100
Citation No. 2338144	100
Citation No. 2338145	500
Citation No. 2338146	500
Citation No. 2338147	300
Citation No. 2338151	300
Citation No. 2338153	300
Citation No. 2338156	300
Citation No. 2338157	300
Citation No. 2338158	300

Citation No. 2338703	300
Citation No. 2338710	300
Order No. 2338711	400
Order No. 2338712	<u>750</u>

Total \$4,850



Gary Melick  
Assistant Chief Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
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FALLS CHURCH, VIRGINIA 22041

NOV 21 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No: SE 83-29  
Petitioner : A/O No: 40-00524-03508  
: :  
: No. 21 Mine  
v. :  
: :  
GRUNDY MINING COMPANY, INC., :  
Respondent :  
and  
GRUNDY MINING COMPANY, INC. : NOTICES OF CONTEST  
Contestant :  
: Docket No: SE 82-36-R  
: Citation No: 757821; 2/24/82  
: :  
: Docket No: SE 82-37-R  
v. : Citation No: 757822; 2/24/82  
: :  
: Docket No: SE 82-38-R  
: Citation No: 757823; 2/24/82  
: :  
: Docket No: SE 82-39-R  
: Citation No: 757824; 2/24/82  
: :  
: Docket No: SE 82-40-R  
SECRETARY OF LABOR, et al : Citation No: 757825; 2/24/82  
Respondent :  
:

DECISION APPROVING SETTLEMENT

Before: Judge Moore

The proposed assessment issued by the assessment office in the above-captioned civil penalty proceedings is \$30,272.00 and the parties are seeking approval to settle for \$27,000.

MSHA has submitted with its moving papers its position with regard to the statutory criteria, and after examining those papers I find no reason to challenge MSHA's position.

I therefore accept the reasons given by MSHA for

agreeing to a settlement and incorporate them herein by reference.

The settlement motion is GRANTED and respondent is ORDERED to pay to MSHA, within 30 days, a civil penalty of \$27,000.



Charles C. Moore, Jr.  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

NOV 26 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 80-376-M  
Petitioner : A.C. No. 42-00784-05003  
: Docket No. WEST 80-416-M  
: A.C. No. 42-00784-05004  
v. : Docket No. WEST 80-487-M  
: A.C. No. 42-00784-05005  
: Docket No. WEST 81-76-M  
: A.C. No. 42-00784-05006  
MARKEY MINES, INCORPORATED, : Docket No. WEST 82-182-M  
Respondent : A.C. No. 42-00784-05007  
: :  
and : Markey Mines  
: :  
CALVIN BLACK ENTERPRISES, : Docket No. WEST 81-392-M  
Respondent : A.C. No. 42-00550-05002  
: :  
: Blue Lizzard Mine

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
Mr. Calvin Black, President, Markey Mines, Inc.,  
Blanding, Utah, pro se.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, charges respondents with violating various safety regulations promulgated under the Federal Mine Safety and Health Administration Act, 30 U.S.C. § 801 et seq., (the "Act").

After notice to the parties, a hearing on the merits was held on August 21, 1984, in Monticello, Utah.

The Secretary did not file a post-trial brief. Respondent, Markey Mines, filed a brief relating to certain threshold issues and was granted an opportunity to file a further brief on the merits of the alleged violations (Order, September 17, 1984). No further brief was filed.

## Issues

Two threshold issues are presented: they concern whether the citations should be vacated because they were issued to the incorrect operator. Further, an issue concerns whether respondent is bound by the acts of its independent contractor. An additional issue is whether respondent is bound by certain evidence offered by a deposition.

Secondary issues are whether respondent violated the regulations. If a violation occurred, what penalty is appropriate.

## Stipulation

In assessing any penalties the parties agreed that Markey Mines is a small mine; further, it has no adverse history for the 24 months prior to the issuance of the citations in these cases. (Tr. 145, 146).

## WEST 80-376-M Citation 336689

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.18-6 which provides as follows:

57.18-6 Mandatory. New employees shall be indoctrinated in safety rules and safe work procedures.

## Summary of the Evidence

MSHA's evidence: Ronald L. Beason, an MSHA inspector, issued this citation because two survey helpers, Boyd Donaldson, age 28, and Scott Sanders, age 19, were not trained in safety rules (Tr. 14-17).

The miners, employees of Sanders Exploration Company, were surveying old workings. There were five employees of Markey Mines observed in the drift where the two surveyors were located (Tr. 17, 18).

The citation, an alleged S&S violation, was served on Wendell Jones and Hanson Bayless, Markey representatives who were present. The citation was issued because the two surveyors were untrained in the use of self-rescue equipment. Jones claimed the men were employees of Sanders Exploration Company and, therefore, respondent had no obligation to train them. In the inspector's opinion the men should also have been instructed in ground control, radiation, dust, evacuation, electricity and bulkheads. The surveyors responded to the orders of Jones and Bayless (Tr. 18-27, 40). Inspector Beason ordered the surveyors to leave the mine. He further instructed the men in the use of self-rescue equipment. The company was directed to complete their training within three days (Tr. 153-156).

Petitioner's evidence includes the decision of Commission Judge Virgil Vail in Secretary v. Calvin Black Enterprises, 5 FMSHRC 1440 (Tr. 9, 10; Exhibit P-1).

Calvin Black, Hanson Bayless, and Wendell Jones testified for respondent.

Calvin Black indicated that Calvin Black Enterprises (hereafter "CBE") is a sole proprietorship owned by himself. CBE owns the capital stock in Markey Mines and the lease on the minerals rights. CBE contracted with Markey Mines to operate the mine. Markey Mines owns the mining equipment.

CBE also contracted with Sanders Exploration to survey the mine. Sanders had general authority to enter the mine. But, in fact, on the day of this inspection, Donaldson and Sanders were underground without respondent's permission. The company later precluded such action by keeping its gates locked (Tr. 70, 74, 80).

Hanson Bayless and Wendell Jones both indicated that when they arrived at the mine at 8:00 a.m. on the day of the inspection the surveyors had already gone underground. In addition, Bayless, in his 30 years' experience, had never seen the need for self-rescue equipment in this mine. This condition may have been a hazard in some mines but not in the Markey Mines (Tr. 99-100, 123-125).

Wendell Jones claimed the inspector's instructions to the surveyors concerning self-rescue equipment took only 15 minutes. He further denied that the inspector directed him to give additional training to Donaldson and Sanders (Tr. 157).

#### Discussion

Respondent raises two threshold issues. Initially, it is asserted that the cases are fatally defective because the citations name the operator as "Calvin Black Enterprises." But the proposal for penalty was filed in five of the cases against "Markey Mines, Incorporated" namely, in WEST 80-376-M, WEST 80-416-M, WEST 80-487-M, WEST 81-76-M and WEST 82-182-M.

The second contention is that the two surveyors were employees of Sanders Exploration Company, an independent contractor. Therefore, respondent urges it cannot be held liable for the acts of an independent contractor.

Concerning the initial issue, it is correct that the citations in the above docketed cases show the operator as "Calvin Black Enterprises." The citations further identify the mine site as the "Markey Mines."

I find the facts concerning the interlocking ownership of CBE and Markey Mines to be as related by Mr. Black in his testimony. In short, Markey Mines was the operator. Although the citations were issued showing CBE as the operator, the same citations also identified the site as Markey Mines. CBE and Markey were fully apprised of the situation and the record fails to disclose that CBE or Markey were prejudiced. Section 104(a) of the Act, now 30 U.S.C. § 814(a), requires the Secretary to issue his citation to the operator. But on the facts here, I conclude that whatever errors occurred in the issuance of the citations were cured by the Proposals for Penalty filed in these cases. The proposals filed named Markey Mines as respondent. In its answer Markey admits it is the operator, admits that its products affect commerce, and admits the issuance of the citations. In short, the Secretary amended the citations when he filed his proposals to assess penalties.

For the foregoing reasons I deny the motion to dismiss.

The second threshold issue concerns the status of Sanders Exploration Company as an independent contractor. It is asserted that its employees (Donaldson and Sanders) would likewise be independent contractors. Hence, it is argued that the production operator would not be responsible for the training of such individuals.

The latest Commission decision involving the independent contractor doctrine was issued on August 29, 1984 in Cathedral Bluffs Shale Oil Company, 8 FMSHRC 1871. In the decision the Commission considered the effect of the Secretary's formally adopted policy regarding the issuance of citations to an operator for violations of the Act committed by an independent contractor.

The citation in the instant case was issued before the Secretary's policy took effect. But, the production operator (Markey Mines), would be liable under the law applicable before the adoption of the Secretary's policy and it would also be liable under the Secretary's later policy. The liability arises from the fact that a part of the determination of liability includes an evaluation of whether the production operator's miners were exposed to the hazard created by the independent contractor. Old Ben Coal Co., 1 FMSHRC 1480 aff'd., No. 79-2367 (D.C. Cir. January 6, 1981); Cyprus Industrial Minerals Company, 3 FMSHRC 1 (January 1981), aff'd. 664 F.2d 1116 (9th Cir. 1981).

The evidence here establishes that when the two Sanders employees were underground at least five employees of Markey Mines were in the drift where the surveyors were located (Tr. 17, 18).

The five Markey employees were thus exposed to any hazard the new inexperienced employees might generate due to their lack of training in safety and safe work procedures.

Accordingly, the independent contractor defense cannot prevail in this factual setting.

During the trial the Secretary offered the decision of Judge Vail in the case of Secretary v. Calvin Black Enterprises, cited supra. The Secretary offered the case to invoke the doctrine of res judicata. It is claimed that respondent is bound by Judge Vail's decision since that case involved Sanders Exploration Company, self-rescue equipment, and the independent contractor issue.

In support of his position the Secretary has cited United States v. Stauffer Chemical Company, 104 S. Ct. 575 (1984)(Tr. 8, 9). I disagree with the Secretary. The cited case is not controlling because the doctrine of defensive collateral estoppel does not apply unless the issue was litigated in another case involving "virtually identical facts." It is not shown that the facts in the instant case are identical with Judge Vail's case. I, accordingly, reject the Secretary's motion to invoke the doctrine.

As to the violative condition itself the evidence establishes that two men, who were only employees for two days, were untrained in many areas of safety. Violations of safety rules and procedures by these workers could endanger themselves and the five Markey Mine employees on the site. It is the operator's duty to control the independent contractor's workers and their activities, as they generally affect the respondent's employees in the mine.

Respondent further claims that the Sanders employees went underground before the operator's supervisors arrived on the job site that morning and that they did so without permission. It is argued they were trespassers.

I reject this contention. Sanders Exploration, according to Mr. Black, had general authority to enter the mine. With such general authority they did not have to secure permission to enter on a daily basis.

The citation should be affirmed.

#### Citation 336810

This citation alleges a violation of 30 C.F.R. § 57.11-51(b), which provides:

57.11-51 Mandatory. Escape routes shall be:  
(b) Marked with conspicuous and easily read direction signs that clearly indicate the ways of escape.

#### Summary of the Evidence

MSHA Inspector Ronald Beason asked Wendell Jones to go into the return air haulageway. Jones identified this area as his

escape route. The inspection party became lost and backtracked four times (Tr. 27-29).

The hazard, caused by a lack of signs, is that miners could be trapped because they would not have time to backtrack and search for an escape route during an evacuation (Tr. 29-30).

Respondent's evidence through witnesses Black, Bayless and Jones shows the new haulageway was completed in the week before the inspection. In addition, the company was in the process of installing large fans, airlines, and was cleaning up. At the time of the inspection there were no signs up. The old drift was without signs and it had never had any. The inspectors had never told the company that signs were necessary (Tr. 102-104, 123-135, 179).

Witness Wendell Jones indicated he did not get lost in the escapeway. Actually, he was looking for a jeep but he was neutral as to whether or not the inspection party found it (Tr. 129, 130).

MSHA's rebuttal evidence indicated that Calvin Black Enterprises was issued a notice under MESA (MSHA's predecessor) for failure to have a second escapeway on September 11, 1974. The condition was abated in April, 1976 (Tr. 148, 149; Exhibit P-2).

Bayless testified that MESA approved a refuge area as a second escapeway. Everyone who worked at the Markey Mine had been instructed where the area was located. The mine had five miners and a superintendent (Tr. 102-104, 123-135, 179).

#### Discussion

MSHA's evidence establishes the escape route was not marked in any fashion to indicate it was an escape route. Respondent's evidence confirms the violation.

The evidence is conflicting as to whether the escapeway was completed within the week before the inspection or in April, 1976. I credit respondent's evidence that the parallel haulageway was completed within a week before the inspection. The citation should be affirmed on the uncontroverted evidence that the escapeway was unsigned. But the short time since the opening relates to respondent's negligence, an issue to be considered in connection with the assessment of a penalty.

#### WEST 80-416-M Citation 336866

This citation alleges a violation of 30 C.F.R. § 57.12-20, which provides:

57.12-20 Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material

shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

#### Summary of the Evidence

Federal Mine Inspector Roy Maki, a person trained in the hazards of electricity, issued this citation (Tr. 160-162).

He wrote the citation at the entrance to a flank drift in a new development. A switch box was not grounded. Further, there was no insulating material for protection. The switch box controlled the fan, which was running. The fan provided air to the drift (Tr. 162-166).

The area around the 440-volt fan was dry. Anyone activating the fan would be exposed to the hazard of being injured if the ground fault system failed. In addition, a fire would be possible if a bearing on the fan burned out (Tr. 163-164, 169).

Inspector Maki had previously discussed this fan with Wendell Jones. At that time he noticed it lacked a ground. A worker could be burned or killed by this hazard. Inspector Maki issued this citation as an S&S violation. He still considered it to be such at the time of the trial (Tr. 163-168).

A dry wood platform, such as the standard requires, prevents a person from being shocked. Rubber boots, such as those used by miners, are also a good insulator. If a miner was standing on dry rock, or sand, the electrical charge would not go any further to ground. However, if a miner's boots were wet or if the miner was standing on a dry board, an electrical charge would go to ground (Tr. 162, 169, 170).

If a mat had been present and there had been a ground, no citation would have been issued (Tr. 172, 173).

Witness Bayless, testifying for respondent, indicated that no one had ever been injured or shocked from turning on this fan. There is wet drilling at the face but Bayless had never seen a miner, who might have been wet, turn on the blower. The blower was equipped with fuses (Tr. 189-192).

#### Discussion

The regulation requires that the fan and switch have a frame ground. There was no such ground here and the inspector wrote the citation to that effect (Tr. 162). The dry wooden platform and the requirements for an insulating mat would be in lieu of a ground (Tr. 162).

The factual situation establishes a violation of the regulation.

Respondent's evidence does not present a defense. The citation should be affirmed.

WEST 80-487-M  
Citation 337161

This citation alleges a violation of 30 C.F.R. § 57.3-22, which provides:

57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Summary of the Evidence

Larry Day, an MSHA inspector, has extensive experience concerning loose ground (Tr. 193-195). He issued this citation because there was a loose slab hanging onto a rib in a travelway. The slab was on the side of a pillar. Miners were walking by the slab and vehicles were hauling muck out of the pillar area (Tr. 195).

The drift was 10 foot high and 15 to 20 feet wide. The slab was 9 feet high and 15 feet long. The ground was very heavy and there was blasting in the area (Tr. 196). Pillars in the area were cracked and many were broken up; there were signs of stress on the roof. This particular slab had a four inch gap 24 inches long along the top and on both sides. The only place where the slab was holding was along its bottom portion (Tr. 196). The slab had come away from the wall at least four inches at the widest place (Tr. 197).

In the inspector's view the slab, which had moved, could either slide down the pillar and tip over or it could tip over and cover the drift (Tr. 197).

From the size of this rock a miner could be disabled or killed (Tr. 197). Falling rock is the primary cause of fatalities in underground mines.

Day agreed that Wendell Jones had told him that the slab could not tip over. As they watched, the slab did not slide towards the haulageway. It was resting on its base.

Respondent's witness Wendell Jones, with over 30 years' experience in mining, testified that this particular slab was already loose and resting on the sill (Tr. 203). It would not have come loose from this position because it would have to slide 5 or 10 feet all at once (Tr. 204).

Jones intended to take down the slab but under the circumstances here no one could be injured. It would not tip over because there were 3 to 4 bars holding it (Tr. 201).

After the citation was issued Jones shot the slab with a couple of sticks of powder (Tr. 202).

#### Discussion

I credit MSHA's evidence on this citation. Inspector Day describes the condition of a very large loose slab. The inspector correctly ordered the removal of the slab since it was in close proximity to the miners who were working nearby.

Respondent's evidence is not persuasive. Even though the slab was resting on a sill, its stability was suspect. It could be affected by the ground behind it, by the blasting, or by the work being carried on in close proximity. I, accordingly, reject respondent's premise that the condition presented no hazard. Cf. Homestake Mining Company, 4 FMSHRC 146, 150 (1982).

The citation should be affirmed.

WEST 81-76-M  
Citations 576708, 576709, 576710

A portion of MSHA's proof of the alleged violations in this case arises from the deposition of George Rendon taken June 30, 1983 in Salt Lake City, Utah (Exhibit P-3).

Respondent strenuously objected to the use of the deposition of George Rendon on the grounds that Francis J. Nielson, Esq., was not authorized to represent respondent at the deposition. Accordingly, respondent asserts the deposition had no evidentiary value.

The judge admitted the deposition of witness Rendon and overruled respondent's objections (Tr. 207-223). At this point it is necessary to review the relevant factors concerning the deposition.

As an initial matter I note that Francis J. Nielsen, Esq., appears as attorney of record for respondent in WEST 80-376-M, WEST 80-416-M, WEST 80-487-M, and WEST 81-76-M (the instant case). Mr. Nielsen has never sought to withdraw.

The deposition of witness George Rendon was taken on June 30, 1983 to preserve his testimony since Rendon was leaving the country for Indonesia the following week (Deposition transcript, Exhibit P-3 at 6). At the deposition petitioner was represented by Phyllis K. Caldwell, Esq., and Francis J. Nielson, Esq., appeared for respondent. A reading of the deposition indicates that Mr. Nielsen was present and took part in the examination of witness Rendon. It is also true that Mr. Nielsen left the deposition before it was completed (see deposition page 21). He did not state his reason for leaving, but he entered a number of objections on the record. Most of the objections relate to the competency of witness Rendon to render an expert opinion on electrical matters. 1/

A factor further bearing on this issue is that a hearing in the Markey Mine cases was scheduled on November 15, 1983. At that hearing respondent's request for a continuance was granted. The record of the proceeding at that hearing reflects some discussion of the status of attorney Nielsen (Tr. of November 15, 1983 at pages 10, 19, 20, 22-23). There is however, no indication that attorney Nielsen's services had been terminated as of November, 1983. I, accordingly, conclude Mr. Nielsen had the authority to represent respondent at the Rendon deposition in June, 1983.

The deposition was proper evidence under the Commission's Rules of Procedure, Rule 56, 29 C.F.R. § 2700.56 and under the Federal Rules of Civil Procedure, Fed. R. Civ. P., Rule 26.

Citation 576708

This citation alleges a violation of 30 C.F.R. § 57.12-13, which provides:

57.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of

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1/ The judge did not have an opportunity to rule on the objections at the hearing. But, having read the deposition, I conclude that a number of them are well taken. Those objections, relating to the competency of witness Rendon to render an expert opinion pertaining to electricity, as stated in Exhibit P-3, on pages 16, 17, and 22 are sustained. The answers of the witness are, accordingly, stricken. The balance of respondent's objections are overruled.

the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and, (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

#### Summary of the Evidence

MSHA's evidence: George Rendon testified by deposition and Preston Hunt appeared in person.

George Rendon issued citations in 1981 and 1982 at respondent's uranium mine. The company mines by using a drift and room process (Exhibit P-3 at 7). Employment at the mine has ranged from a high of eleven to a low of three. In 1980 and 1981 they were mining at the site (P-3 at 8).

Rendon, who was not experienced in electricity, issued Citation 576708 on August 7, 1980 because a splice in a distribution cable was not adequately grounded. The citation was issued for a violation of § 57.12-13, now docketed in case WEST 81-76-M (P-3 at 9, 10, 13; deposition Exhibit 1).

Wendell Jones and Preston Hunt accompanied Rendon. The original assessed penalty <sup>2/</sup> was \$34 and at a conference it was reduced to \$28.00 (P-3 at 10).

The citation arose when the inspection party stopped to see if a fan was grounded. The inspector noticed the cable was three-quarters of an inch thick (P-3 at 10, 11).

Jones said he didn't know if there was adequate insulation under the splice. As they walked towards the working face they saw two other places where the splice was smaller than the original cable. On unwrapping it they found there was no insulation. It consisted of bare wire and the connector (P-3 at 12). The cable was being used to power a fan (P-3 at 12-13). The three splices in the main airway were not mechanically strong and could not exclude moisture (P-3 at 16, 24). The cable was hung on hooks about every 20 feet (P-3 at 16). In the immediate vicinity of the cable there were three miners removing ore. Equipment operating in this eight-foot drift could hit the cable,

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<sup>2/</sup> The petition for assessments shows the original assessed penalty was \$28.00.

or the equipment could hook it and pull it apart. The miners were in close proximity to this condition (P-3 at 18-20). The equipment in the drift was 15 feet long by 5 feet wide (P-3 at 19).

If an accident occurred it would affect the entire mine. The condition was corrected within the time specified by the citation (P-3 at 24).

Rebuttal Witness Preston Hunt testified that he has been an electrician for 49 years. He possesses considerable electrical experience (Tr. 262-264).

Rendon issued this citation because Witness Hunt, at the time, was not a duly authorized representative of the Secretary (Tr. 264).

The outside diameter of the cable was 1 and 1/2 inches and the splices were of lesser thickness. The smallest diameter was three-quarters of an inch (Tr. 266; Exhibit P-4).

Bayless had used SCOTCHGUARD, a pliable taping material, to fill in a proper splice (Tr. 267).

Bayless, at Jones' request, took the splice apart and found there was insufficient insulation. A minimal impact could penetrate the wires and cause a short or a ground (Tr. 268).

The conductors in the cable were three No. 8 wires protected by a neoprene cover. It was 600 volts phase to phase. These splices would not be acceptable to a certified electrician. Here there was a loss of mechanical protection. With the loss of such protection the splices can pull apart (Tr. 270).

Respondent's evidence consisted of witnesses Hanson Bayless and Wendell Jones. The splices, in Bayless' opinion, were not defective. Initially, a split bolt connector is used to hold the two wires together. Insulating compound then covered the wires. Each wire is wrapped with electrical tape and all three wires are taped together. After wrapping the electrical wires in the splice the cable would be thinner than the original cable because the fiber cords had been cut away. Jones had seen qualified electricians make splices in this fashion (Tr. 223-227, 236, 237).

A dispute exists as to who unwrapped the splice. Hunt claimed that Bayless unwrapped it. But Bayless specifically denied that he did so (Tr. 282, 286).

#### Discussion

On this citation I credit the testimony of MSHA witness Hunt. He has 49 years of extensive experience as an electrician. It is

clear that the splices here were not as mechanically strong as nearly as possible because the original fibers had been cut away. Exhibit P-4, an illustrative drawing, shows the deterioration of the mine distribution cables.

Bayless testified that the splice was not defective; further, he had seen experienced electricians splice in this fashion. I am not persuaded. A splice made by an experienced electrician is not necessarily mechanically strong, insulated and provided with damage protection as near as possible to that of the original. Respondent's witnesses are not as experienced nor as expert as petitioner's witness Preston Hunt. Jones indicated the cable splice was a matter Bayless should handle (Tr. 237). Bayless, at best, had a minimal background in electricity (Tr. 224).

The citation should be affirmed.

#### Citation 576709

This citation alleges a violation of 30 C.F.R. § 57.12-25, which provides:

57.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

#### Summary of the Evidence

Inspector George Rendon issued this citation on August 7, 1980 for an alleged violation of § 57.12-25 (P-3 at 24, 25; deposition Exhibit 2).

They were inspecting an emergency escapeway when they observed that a ground wire was not connected to a switch box. The inspector did not find any other ground. The ground wire, which was hanging loose, was about eight feet from the switch box (P-3 at 25, 26-28).

The main power source and ground wire came through a bore hole which had been drilled from the surface into the tunnel. The casing was ungrounded. Further, it was not protected by equivalent grounding protection (P-3 at 26). The 440-volt switch box, hanging on a rib, measured 24 inches wide and 36 to 40 inches long (P-3 at 26, 30). The company was aware of the grounding requirement because other switch boxes were properly grounded (P-3 at 30).

A lightning storm could cause a short. There was water in the drift.

A contractor does respondent's electrical work (P-3 at 28).

This citation was abated within the time specified (P-3 at 32).

The original assessment was \$34 and at a conference it was reduced to \$14. The notice of assessment proposes a penalty of \$14 for this citation (P-3 at 25).

Hunt, MSHA's rebuttal witness, confirmed Rendon's testimony. Hunt observed that the messenger wire, which was loose, could have returned the fault current to the source of its generation. But the messenger wire was not attached to the metal portion of the switch gear to provide a path for the fault current to be returned. Hunt had prepared an illustrative drawing showing the 2/0 A.W.G. cable.

If a person touched the box he could be shocked even though the area was not damp. The absence of a dry platform increased the hazard. A dry floor has a measure of conductivity (Tr. 274-285; Exhibit P-5).

Respondent's witness Jones stated he didn't remember too much about this condition. They thought it had been properly grounded (Tr. 237).

According to Jones, no miner had ever been shocked at Markey Mines (Tr. 238, 241).

#### Discussion

The standard requires that all metal encasing electrical circuits shall be grounded or provided with equivalent protection. The uncontroverted evidence shows the main metal switch box was not so protected.

The fact that no miner has ever been shocked at the Markey Mines is not a defense. A prime purpose of the Act is to prevent the first accident.

The citation should be affirmed.

#### Citation 576710

This citation alleges a violation of 30 C.F.R. § 57.12-20, which provides:

57.12-20 Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material

shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

#### Summary of the Evidence

MSHA Inspector Rendon wrote this citation for a violation of § 57.12-20. At the main power control switch box (discussed in the prior citation) there was no insulating mat or dry wooden platform for a person to stand on when activating the switch. Shock hazards exist at this location. There was no metal plate kept at the same potential as the grounded metal non-carrying parts of the power switch. The hazard includes possible electrocution. Mats were supplied in front of similar switches and motors. The dangers are inherent in this situation as were discussed in connection with Citation 576709 (P-3 at 32, 33; deposition Exhibit 3).

This hazard was abated in the time specified.

MSHA's witness Hunt confirmed there was no mat. Further, there was water caused by a leaking water line approximately 50 feet from the switch (Tr. 279-281).

Wendell Jones testified he did not believe there was a hazard because a miner would be protected by his rubber boots (Tr. 243).

The parties stipulated that the evidence already in the record concerning hazards could be considered in connection with this citation (Tr. 244).

#### Discussion

No credibility issue is presented. Petitioner established a violation and respondent confirms it.

The citation should be affirmed.

WEST 82-182-M  
Citation 584354

This citation, relating to ground conditions, alleges a violation of 30 C.F.R. § 57.3-22. The standard was cited in WEST 80-487-M, supra.

### Summary of the evidence

Inspector Rendon issued this citation on October 27, 1981. Walking down the main drift, the inspector observed loose slabs one to two inches from the roof. The slabs were two to three feet wide and four to six inches thick (P-3 at 35, 38; deposition Exhibit 4). The loose slabs were at three different locations in the middle of the back of the main haulageway (P-3 at 35). One was on the straightaway of the main drift, one was on the right side, and one was close to where they were doing the mining. This was a location where supervisors are to check daily. Further, in this area miners are to test the ground at the beginning of each shift (P-3 at 36).

The ground was not adequately supported. Work was not being done in this area but miners had to pass here to reach their work stations (P-3 at 37). In the inspector's opinion the slabs had been loose for more than a day or two. Blasting vibrations could have caused such a condition. A miner could be killed if the slab fell when he came under it (P-3 at 38).

Some ground control devices, such as rock bolts and chainlink wire, were in an area near one of the loose slabs. Foreman Bayless told the inspector that they had failed to see the loose. Further, they were working on another area and didn't have enough bolts to finish it. Three miners and a foreman working in the mine were exposed to this condition (P-3 at 40).

The original assessment on Citation 584354 was not reduced at conference and it remained at \$14 (P-3 at 35).

Witness Wendell Jones testified that the condition for which the company was cited is called "feathered ground" (Tr. 247). The slabs are about as stated, namely two feet wide and three feet long and four to six inches thick (Tr. 247). As they go back they get a little thicker. They are periodically barred down (Tr. 247). When Jones tested the slabs they couldn't bar them down so roof bolts were used (Tr. 248). If they barred down the area periodically, none of the slabs would come down (Tr. 250).

### Discussion

The recollection of witness Jones concerning this event is somewhat hazy. But the regulation requires loose ground to be either barred down or adequately supported. Since neither action took place before this citation was issued I conclude that a violation of the regulation occurred.

The citation should be affirmed.

### Citation 584356

This citation alleges a violation of 30 C.F.R. § 49.4, which provides, in part, as follows:

(b) An application for alternative mine rescue capability shall be submitted to the District Manager for the district in which the mine is located for review and approval.

Inspector Rendon issued this citation because Mr. Bayless indicated to him that the mine rescue plan had not been mailed to the MSHA District Manager (P-3 at 41; deposition Exhibit 5). The mine did not have a mine rescue plan (P-3 at 43).

The witness had also reviewed the MSHA records in Moab, Utah and called the Denver District office prior to inspecting the mine. There was no evidence that the application had been submitted by Markey Mines (P-3 at 44, 45). Rendon had no knowledge that Markey Mines ever submitted an application under § 49.3 to qualify as a small and remote mine (P-3 at 45). The mine abated this condition by submitting a plan (P-3 at 46).

Mr. Black testified that the mining operation was winding down immediately before this citation was issued. He also requested a waiver from MSHA but never received a reply. The parties stipulated that respondent could supplement the record with a copy of Mr. Black's letter requesting a waiver. A copy of the request was filed <sup>3/</sup> and marked as Exhibit R-1 (Tr. 253).

Witness Bayless indicated that he was told the company could get a waiver of the mine rescue plan. In October, 1981, there were either three or five employees at the mine.

#### Discussion

Mr. Black's letter, dated a month before this citation, requested a waiver of this regulation.

MSHA cannot issue a waiver for Title 30, Code of Federal Regulations, Part 49, relating to Mine Rescue Teams. But there is a provision permitting MSHA to approve alternative mine rescue capability for small and remote mines. Markey Mines fits that category (§ 49.3).

Respondent is charged with violating § 49.4. The regulation requires, in part, that an alternative rescue capability plan shall be submitted to MSHA's District Manager. On the facts

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<sup>3/</sup> There was no stipulation by the parties concerning MSHA's purported reply letter to Mr. Black and it is not evidence in the case.

there was a technical violation but respondent's good faith and minimal negligence are established by his letter to MSHA written a month before the citation was issued. But these matters relate to the imposition of a penalty and not to whether a violation occurred.

WEST 81-392-M  
Citation 583991

Respondent: Calvin Black Enterprises

This citation alleges a violation of 30 C.F.R. § 57.5-39, which provides:

57.5-39 Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings.

Since petitioner offered no evidence to support this citation an order vacating the citation is proper (Tr. 246).

Citation 583992

This citation alleges a violation of the radon daughter regulation, § 57.5-39, cited, supra.

In this case since petitioner offered no evidence, an order vacating the citation is proper (Tr. 246).

CLOSING REMARKS BY  
CALVIN BLACK

At the conclusion of the hearing Mr. Black made a closing statement (Tr. 294-297). I indicated at the conclusion of his remarks that they should be addressed to a forum having legislative power and not one who has adjudicative authority (Tr. 298).

However, portions of Mr. Black's remarks do require a reply by the judge.

Mr. Black stated in his remarks that he did not secure certain information he requested under the Freedom of Information Act (Tr. 296). I note that Mr. Black had not requested any information under the Commission's discovery rules. Such a suggestion was made by the judge to Mr. Black on December 15, 1983. (Tr. 11-12, hearing of December 15, 1983).

Mr. Black's remaining statements in his closing argument are not relevant to these proceedings and his allegations as to MSHA are not substantiated on the record.

CIVIL PENALTIES

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

Following the statutory directives I find the following facts: in accordance with the stipulation respondent has no adverse history of prior violations for a period of two years. The mine is small but so are the proposed penalties. Hence, I feel they are generally appropriate. The operator was moderately negligent as the violative conditions could have been readily corrected. As previously indicated the negligence of the operator in connection with Citation 336810 (unsigned escapeway) has been overstated. The operator has discontinued its mining operations; accordingly, the imposition of a penalty cannot affect its ability to continue in business. The gravity of each violation is apparent on the facts. Respondent's statutory good faith is established by its actions in abating the violative conditions. As previously discussed, respondent's good faith has been understated in connection with Citation 584356 (rescue plan).

In the following cases, wherein the respondent is Markey Mines Incorporated, the following penalties should be assessed:

WEST 80-376-M

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Disposition</u>
336689	\$26	\$26
336810	36	18

WEST 80-416

336866	\$38	\$38
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WEST 80-487

337161	\$90	\$90
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WEST 81-76-M

576708	\$28	\$28
576709	14	14
576710	28	28

WEST 82-182-M

584354	\$14	\$14
584356	12	6

In the following case Calvin Black Enterprises is the respondent and all penalties should be vacated.

Case No. WEST 81-392-M

<u>Citation No.</u>	<u>Proposed Penalty</u>	<u>Disposition</u>
583991	\$38	Vacate
583992	32	Vacate

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. In WEST 80-376-M the following citations are affirmed and penalties assessed therefor:

<u>Citation No.</u>	<u>Penalty</u>
336689	\$26
336810	18

2. In WEST 80-416-M the following citation is affirmed and a penalty assessed therefor:

<u>Citation No.</u>	<u>Penalty</u>
336866	\$38

3. In WEST 80-487-M the following citation is affirmed and a penalty assessed therefor:

<u>Citation No.</u>	<u>Penalty</u>
337161	\$90

4. In WEST 81-76-M the following citations are affirmed and penalties assessed therefor:

<u>Citation No.</u>	<u>Penalty</u>
576708	\$28
576709	14
576710	28

5. In WEST 82-182-M the following citations are affirmed and penalties assessed therefor:

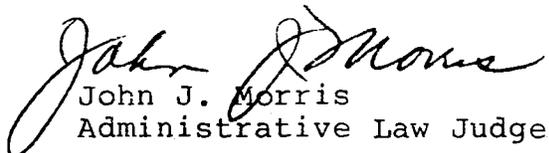
<u>Citation No.</u>	<u>Penalty</u>
584354	\$14
584356	6

6. In WEST 81-392-M, wherein Calvin Black Enterprises is the respondent, the following citations and all proposed penalties therefor are vacated:

Citation No.

583991

583992

  
John J. Morris  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400  
DENVER, COLORADO 80204

NOV 27 1984

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 80-155-DM  
ON BEHALF OF : MD 79-267  
PATRICIA ANDERSON, :  
Complainant : Cotter Mill  
 :  
v. :  
 :  
STAFFORD CONSTRUCTION COMPANY, :  
Respondent :

DECISION AFTER REMAND

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Complainant;  
Mrs. Jackie Stafford, Stafford Construction Company,  
Grand Junction, Colorado, pro se.

Before: Judge Morris

This case involves a complaint of discrimination filed by the Secretary of Labor on behalf of Patricia Anderson pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Complainant Patricia Anderson alleged the operator discriminated against her and thereby violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c).

The case was heard by the undersigned judge who entered an order dismissing the complaint, 3 FMSHRC 2177 (1981). The Commission subsequently affirmed the judge, 5 FMSHRC 618 (April 1983).

Thereafter, on April 20, 1984, the U.S. Court of Appeals for the District of Columbia Circuit entered its decision in the matter, 732 F.2d 954 (D.C. Cir. 1984). The Court reversed the Commission's decision and concluded that Stafford Construction Company's discharge of Patricia Anderson violated section 105(c) of the Mine Act, 30 U.S.C. § 815(c). The Court further remanded the case to the Commission "for the award of back pay and other remedies, if warranted", 732 F.2d at 962. A certified copy of the Court's judgment, in lieu of a mandate, was received by the Commission on July 26, 1984.

On August 9, 1984 the Commission remanded the case to the judge for further proceedings consistent with the Court's opinion.

The judge set the case for a hearing in Canon City, Colorado on September 13, 1984. Respondent requested a continuance and the hearing on the merits was rescheduled and took place on October 11, 1984.

The parties waived the filing of post trial briefs.

#### Issues

The issues concern whether back pay is due Patricia Anderson, and, if so, the amount of the back pay. A secondary issue concerns the assessment of a civil penalty against respondent.

#### Summary of the Evidence

At this hearing complainant Patricia Anderson reaffirmed her previous testimony and indicated she had been terminated by respondent on February 9, 1979. Her rate of pay at that time was \$1,050 per month. She found employment again on June 7, 1979. (Transcript at pages 29 and 30, hearing of October 11, 1984).

Complainant received unemployment compensation of \$110 per week for 14 weeks from the State of Colorado. Complainant further submitted exhibits calculating the back pay and interest. These calculations were summarized as follows:

	<u>Backpay Due</u>	<u>Interest to 9/13/84</u>	<u>Quarter Total</u>
1st Qtr 1979	\$1,696.10	\$1,182.82	\$2,878.92
2nd Qtr 1979	2,277.62	1,554.22	3,831.84
Totals	<u>\$3,973.72</u>	<u>\$2,737.04</u>	<u>\$6,710.76</u>

Interest at the current rate of 11% per annum (.0003055 daily) will continue to accrue on \$6,710.76 after 9/13/84 at the rate of \$2.05 per day. (Exhibit P-A).

Jackie Stafford, formerly the Secretary/Treasurer for respondent, testified that respondent is now defunct, no longer exists, and has no officers (Tr. 10, 17). Respondent's 1981 income tax return shows a negative balance (Tr. 22; Exhibit R-C).

There was a \$50,000 cash bond posted at the time of company's liquidation. According to Mrs. Stafford, both Tom Smith and Steve Smith (complainants whose cases were heard with the Patricia Anderson case), received their back pay from that bond (Tr. 8-9).

Mrs. Stafford further indicated that respondent had a \$453,000 letter of credit. Rippy Construction Company was apparently awarded that asset. Mr. Rippy told Mrs. Stafford that any wages due to Patricia Anderson would be paid (Tr. 10, 18).

The Internal Revenue Service cleared respondent after an audit and a criminal investigation (Tr. 13).

Respondent's exhibits included calculations showing unpaid bills totaling \$111,732.83. Further, respondent submitted a copy of a judgment against it and in favor of Rippy Construction in the amount of \$1,313,561.35. In addition, respondent offered a copy of its 1981 Corporation Income Tax return (Exhibits R-A, R-B and R-C).

### Discussion

Respondent's evidence establishes that it is insolvent. However, bankruptcy and insolvency of a respondent are insufficient reasons to stay proceedings under the Act. Secretary on behalf of George W. Heiney et al v. Leon's Coal Company et al, 4 FMSHRC 572, 574 (1982).

In connection with an award of back pay, a credibility issue arises as to whether Ed Rippy of Rippy Construction paid Patricia Anderson her back wages. Mrs. Stafford claims that Rippy stated that Patricia Anderson's wages would be "taken care of" (Tr. 18). On the other hand, Mrs. Anderson denied that Rippy paid her any money. In fact, she had "never heard of that" (Tr. 31).

I credit Mrs. Anderson's testimony. She would know if a third party paid her. Respondent's claim is, at best, based on unsupported hearsay.

In the presentation of respondent's evidence Mrs. Stafford also sought to offer the records that would support respondent's reasons for discharging Patricia Anderson. The judge ruled that this evidence was not relevant because that issue had been decided by the Court of Appeals when it ruled that respondent had discriminated against complainant (Tr. 24-26).

Based on the record, complainant is entitled to back wages and interest in the total amount of \$6,852.21. The interest is calculated to the date of the issuance of this decision after remand, namely November 21, 1984 (Exhibit P-A). Complainant's interest calculations are in accordance with the Commission decision of Secretary on behalf of Milton Bailey v. Arkansas-Carbona Company and Walker, 5 FMSHRC 2042 (December, 1983).

Complainant received unemployment compensation from the State of Colorado for 14 weeks in the amount of \$110 per week, or a total of \$1,540. The total award to complainant in this case includes said amount but the applicable Colorado statute requires complainant to reimburse the State for said amount, section 8-2-119 C.R.S. 1973. Complainant is, accordingly, directed to reimburse the State of Colorado upon collection of the back pay due her.

#### CIVIL PENALTIES

The mandate of the Appellate Court encompasses the assessment of a civil penalty against respondent.

The statutory criteria to be followed in assessing such a penalty is contained in section 110(i) of the Act, now 30 U.S.C. § 820(i). It provides, in part, as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering these factors, I find that the operator has no prior adverse history except for the fact that Tom Smith and Stephen Smith were discharged in violation of the Act before Patricia Anderson was unlawfully discharged. The Secretary proposes a civil penalty of \$8,000 and while respondent was insolvent at the time of the hearing it had gross receipts in excess of four million dollars in 1981 (Tr. 47, 48). Accordingly, the proposed penalty appears appropriate in relation to the size of the business of the operator. The operator's negligence is not a factor on this record. The assessment of a penalty will not affect the operator's ability to continue in business because it has already terminated its activities and discontinued operations. The gravity of the violation is exceedingly high. Patricia Anderson was retaliated against because she refused to lie to MSHA investigators. Miners need to know they are protected and here the actions by respondent struck at the heart of the enforcement of the discrimination provisions of the Act. The final factor, statutory good faith, is not an element herein.

Considering all of the statutory criteria, I consider that a civil penalty in the amount of \$8,000 is appropriate.

Based on the entire record, I enter the following:

ORDER

1. Complainant Patricia Anderson is awarded and respondent is ordered to pay to her the following amounts:

Back Pay	\$3,973.72
Interest	<u>2,878.49</u>
Total	\$6,852.21

2. The interest awarded herein is to the date of the issuance of this decision after remand.

3. Upon collection of the back pay provided in paragraph 1, complainant is ordered to reimburse the State of Colorado for the unemployment compensation she received from the State between the time of her discharge on February 9, 1979 and her subsequent employment on June 7, 1979.

4. A civil penalty of \$8,000 is assessed against respondent.

  
John J. Morris  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

NOV 27 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 84-166
Petitioner	:	A.C. No. 46-03805-03570
v.	:	
	:	Docket No. WEVA 84-325
SOUTHERN OHIO COAL COMPANY,	:	A.C. No. 46-03805-03585
Respondent	:	
	:	
SOUTHERN OHIO COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 84-94-R
	:	Citation No. 2260722; 11/30/83
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 84-96-R
ADMINISTRATION (MSHA),	:	Order No. 2260729; 12/7/83
Respondent	:	
	:	Martinka No. 1 Mine

DECISION

Appearances: William M. Connor, Esq. and Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor;  
David A. Laing, Esq., Alexander, Ebinger, Fisher, McAlister and Lawrence, Columbus, Ohio, for the Southern Ohio Coal Company.

Before: Judge Melick

These consolidated cases are before me pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act", to contest citations and orders issued to the Southern Ohio Coal Company (SOCCO) and for review of civil penalties proposed by the Mine Safety and Health Administration (MSHA), for the violations charged therein.

A motion for approval of a settlement agreement was considered at hearing with respect to Docket No. WEVA 84-325. A reduction in penalty from \$800 to \$700 was proposed for the violation charged in Order No. 2260729--a violation of the standard at 30 C.F.R. § 75.400 for alleged accumulations of loose, dry coal in the return air course of the North Main Section. Accumulations were found by the MSHA inspector in three different locations and

each was eight feet in length, twelve feet in width, and five feet high. It is stipulated that in view of the location and size of the accumulations, the section foreman should have known of their existence and had them removed. Ten employees were considered exposed to the explosion and fire hazard created by the accumulations. The Secretary suggested that the small reduction in penalty was appropriate in light of the absence of any ignition sources within the cited areas. The nearest source was alleged to have been cables approximately three hundred feet in by. Considering the size of the operator, its prior history of violations, and the good faith abatement of the cited condition, I conclude that the proposed penalty of \$700 is appropriate. I therefore approve the settlement proposal. The request of the mine operator to withdraw the corresponding contest proceeding, Docket No. WEVA 84-96-R, is also approved. 29 C.F.R. § 2700.11.

The remaining citation at issue, Citation No. 2260722, alleges a violation, under the standard at 30 C.F.R. § 75.1403, of a safeguard notice issued at the Martinka No. 1 Mine on September 14, 1978. The safeguard notice required that all conveyor belts in the mine have at least twenty four inches of clearance on both sides of the belt. The citation alleged that a clear travelway of twenty four inches was not provided along the 1-1 east conveyor belt for a distance of fifteen feet because of water lying ten inches deep from rib to rib at the No. 7 stopping.

The evidence is not disputed that a pool of water fifteen feet long did in fact lie in the travelway at the No. 7 stopping. According to Inspector Harry Markley, Jr., the water was ten inches deep at the one location where he measured it with a steel tape and that the ground beneath the water presented a serious slipping and stumbling hazard. He observed that the area under water was slippery from rockdust and muck and that rock could be expected to fall into the walkway. Because of the close proximity of the conveyor belt and its exposed rollers he thought that injuries were likely to people traveling through the cited area. The belt and its moving rollers were not guarded and preshift examiners, belt maintenance men, shift foremen, inspectors, and any member of the belt crew carrying supplies were exposed to the hazard. Markley opined that the water came from seepage over a period of days and he observed that some water had already been pumped out of the travelway.

Joseph Pastorial, chairman of the Union Safety Committee accompanied Inspector Markley on his November 30, 1983, inspection. He testified that the water in the pool came within one inch of entering his twelve inch high boots. According to Pastorial, the water extended from rib to rib for a distance of fifteen feet. He observed that the wet fireclay bottom at that

location was very slippery and created a particular hazard because of its location adjacent to the belt structure and rollers.

Jon T. Merrifield, Safety Director for the Martinka No. 1 Mine, did not directly contradict the government witnesses. Rather he testified only that in the areas he tested, the bottom of the pool of water was smooth, firm and not slippery and that in the area he measured, the water was not deeper than seven inches. It was Merrifield's opinion that even if someone did slip in the water it would be unlikely for him to fall into the belt because the momentum of the fall would cause him to fall forward into the water and not sideways into the belt. Under the circumstances, however, it is clear that the terms of the safeguard notice were violated.

The mine operator nevertheless argues that the citation was erroneously issued because conveyor belts carrying coal are not within the purview of the safeguard notice provisions of the standard at 30 C.F.R. § 75.1403. The standard provides as follows: "[o]ther safeguards, adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and material shall be provided." SOCCO argues that coal is not a "material" within the scope of the cited standard and that accordingly the safeguard notice herein was issued without a proper legal foundation. In furtherance of its position it cites the decision of Commission Judge Koutras in Monterey Coal Company v. Secretary, 6 FMSHRC 424 (1984).

Whether or not coal is a "material" is in any event irrelevant since it is clear that the safeguard standard applies as well to minimizing hazards associated with the transportation of men and materials by foot, in this case miners traveling along the walkway adjacent to the moving conveyor belt. Accordingly the safeguard notice was within the statutory and regulatory authorization under 30 C.F.R. § 75.1403.

SOCCO argues, secondly, that even if the condition cited herein was hazardous it did not come within the safeguard notice alleged to have been violated. The safeguard provides as follows:

A clear travelway at least 24 inches along the no. 1 conveyor belt was not provided at three (3) locations, in that there were fallen rock and cement blocks.

All conveyor belts in this mine shall have at least 24 inches of clearance on both sides of the conveyor belt.

This is a notice to provide safeguards.

It maintains that the safeguard should be strictly construed and that accordingly should be held to apply only to "tripping and stumbling" hazards and not to the slipping hazard allegedly presented by the cited pool of water. However even assuming that safeguards are to be strictly construed there is ample credible evidence in this case that the cited pool of water presented a tripping and stumbling as well as a slipping hazard. Even though "fallen rock", "cement block", and other similar debris may not have been found in the water, it may reasonably be inferred from the evidence that such debris could very well come to rest under the water from the adjacent ribs.

SOCCO also argues that the safeguard requires only "24 inches of clearance" and that such clearance was provided in this case in spite of the presence of water. As the Secretary points out, however, the essence of the safeguard is that a "clear travelway [of] at least 24 inches" must be provided. The travelway cited herein was not clear in that it was obstructed by a pool of water some 10 inches deep, 15 feet long, and extending from rib to rib. SOCCO's arguments are accordingly rejected and the citation is upheld.

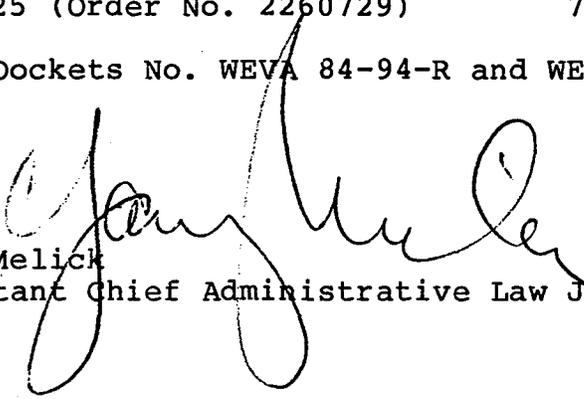
I find, moreover, based on the undisputed facts that a serious falling hazard existed as a result of the cited conditions and that with only a 24-inch clearance between the rib and walkway and the exposed rollers on the adjacent conveyor there was an added grave hazard from pinch points. Serious injuries and even fatalities were reasonably likely and under the circumstances the violation was also "significant and substantial". Secretary v. Mathies Coal Company, 6 FMSHRC 1 (1984). From the undisputed evidence, I also find that this serious hazard was the result of operator negligence in failing to correct conditions that were undoubtedly known but which in any event should have been observed during the required preshift examination. In determining the amount of penalty herein, I have also considered that the operator is large in size and abated the cited violation within the prescribed time. The operator has a considerable history of violations and indeed had previously been cited for the same violation as charged herein based on similar circumstances.

#### Order

Citation No. 2260722 and Order No. 2260729 with their attendant findings are upheld. The Southern Ohio Coal Company is Ordered to pay the following civil penalties within 30 days of the date of this decision:

Docket No. WEVA 84-166 (Citation No. 2260722) \$300  
Docket No. WEVA 84-325 (Order No. 2260729) 700

Contest Proceedings Dockets No. WEVA 84-94-R and WEVA 84-96-R are Dismissed.



Gary Melick  
Assistant Chief Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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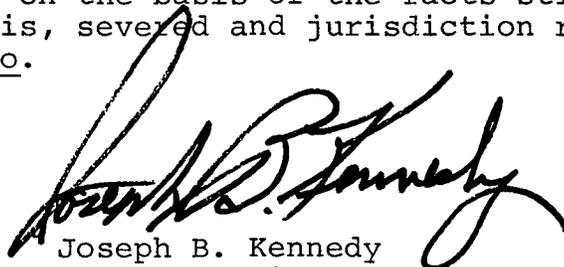
NOV 28 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. SE 84-66  
Petitioner : A.C. No. 01-01247-03585  
v. :  
: Docket No. SE 84-67  
JIM WALTER RESOURCES, INC., : A.C. No. 01-01247-03586  
Respondent :

ORDER AFTER REMAND

The captioned matter has been remanded for consideration of the operator's request that the trial judge's decision approving settlement be corrected so as to reflect the fact that the motion to approve settlement related only to Docket No. 84-66.

Accordingly, it is ORDERED that the decision of October 19, 1984, approving settlement of the captioned matters be, and hereby is, AMENDED to show that only in the case of Docket No. SE 86-66 was settlement approved. It is FURTHER ORDERED that the decision approving settlement in Docket No. 84-66 be, and hereby is, CONFIRMED and that the operator pay the amount of the settlement agreed upon, \$150, on or before Friday, December 14, 1984. Finally, it is ORDERED that pursuant to the parties stipulation to waive a hearing and submit Docket No. SE 84-67 for determination on the basis of the facts stipulated, said docket be, and hereby is, severed and jurisdiction retained to decide the matter de novo.

  
Joseph B. Kennedy  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

NOV 29 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 84-5-M  
Petitioner : A.C. No. 19-00076-05502  
v. :  
: West Roxbury Crushed Stone  
S. M. LORUSSO & SONS, INC., :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to approve settlements for the two violations involved in this matter. The originally assessed amounts totalled \$196 and the proposed settlements are for \$150.

One citation was issued for failure to guard a tail pulley. The Solicitor proposed a settlement for the original amount of \$98. I find this settlement satisfies the statutory criteria.

The second citation was issued for failure to wear protective footwear. The Solicitor has explained why the operator's negligence was less than originally thought. The original assessment was for \$98 and the proposed settlement is for \$52. I accept the Solicitor's explanation and approve the settlement, but the operator should realize it has the responsibility to implement its safety policies, including where appropriate, disciplining employees who defy them.

The operator is ordered to pay \$150 within 30 days of the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

November 30, 1984

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. PENN 84-49  
Petitioner : A. C. No. 36-00970-03537  
v. :  
 : Maple Creek No. 1 Mine  
 :  
UNITED STATES STEEL MINING :  
COMPANY, INC., :  
Respondent :

DECISION

Appearances: Thomas Brown, Esq., Office of the Solicitor,  
U. S. Department of Labor, Philadelphia,  
Pennsylvania, for Petitioner;  
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania,  
for U. S. Steel Mining Company, Inc.,  
Respondent.

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against U. S. Steel Mining Company, Inc., for two alleged violations of the mandatory safety standards.

The hearing was held as scheduled and documentary exhibits and oral testimony were received from both parties. At the conclusion of the hearing, the parties were directed to file written briefs simultaneously within 21 days of receipt of the transcript. The briefs were filed and have been reviewed together with the transcript.

The mandatory standard involved in each violation is section 302(a) of the Act, 30 U.S.C. § 862(a), 30 C.F.R. § 75.200 which provides as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of

the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every 6 months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished to the Secretary or his authorized representative and shall be available to the miners and their representatives.

Citation No. 2104531

Citation No. 2104531, dated May 24, 1983 sets forth the alleged violative condition or practice as follows:

During the course of a fatal roof fall accident investigation it was revealed that there was a violation of safety precaution No. 3 of the operator's approved roof control plan dated 2/10/83. The violation occurred in the face area of No. 6 room and No. 20 split intersection. Two mining surveyors were approximately 26 inches and 36 inches inby permanent roof supports on the 20 split side and approximately 11' 3" and 6' 9" on the 6 room side, under unsupported roof. The roof control plan requires that only those persons engaged in installing temporary supports shall be allowed to proceed beyond the last row of permanent supports until temporary supports are installed. The violation occurred in 7 flat 8 room right 006 section. Note - this citation will not be terminated until the area involved is permanently supported and all employees (underground) are reinstructed in No. 3 safety precaution of the approved plan.

Mr. Glenn Ward and Mr. Nathan Klingensmith were engineers or underground plan coordinators who installed spads and site lines so that entries and crosscuts would be driven straight and at proper angles (Tr. 9). Mr. Klingensmith was Mr. Ward's assistant (Tr. 23-24). On the morning in question the mine foreman, Mr. Earl Walters, assigned them to install site spads at various locations in the mine including the No. 20 split at the intersection of the No. 7 room (Tr. 16, 30, 34).

When Mr. Ward and Mr. Klingensmith arrived on the section they saw the section foreman, Mr. Walter Franczyk who was on the telephone at the time (Tr. 30-31, 34). They said hello to the section foreman but kept on going and did not stop (Tr. 36-37, 53). However, instead of going to the intersection of the 20 split and No. 7 room, they went to the intersection of the 20 split and No. 6 room (Tr. 26). None of the witnesses could explain why the engineers went where they did (Tr. 26, 29). When the engineers arrived at the 20 split and 6 room intersection, the continuous miner operator helper told them the roof was bad (Tr. 31). Mr. Klingensmith replied but his response was unintelligible (Tr. 31). Mr. Klingensmith then went beyond the last row of roof bolts and out under unsupported roof where he installed site spads (Tr. 31-32). He was under unsupported roof for five to ten minutes (Tr. 10-11, 31). The continuous miner machine was then repositioned and some loose coal was cleaned up (Tr. 31). Mr. Ward asked that the machine be left where it was at the face (Tr. 32). He then went out under unsupported roof and climbed up on the machine. Mr. Klingensmith also went out under the unsupported roof and was either beside the machine or climbing up on it when the roof fell killing both men (Tr. 32).

The operator does not dispute that both men were under unsupported roof when they were killed and that their actions violated the roof control plan which prohibits anyone from proceeding beyond the last row of permanent roof supports except for the purpose of installing temporary supports. Nor is there any dispute that the decedents were negligent in going beyond supported roof in violation of the roof control plan.

At issue is whether under the circumstances presented the operator also should be found negligent for the actions of its employees. In determining the amount of civil penalty to be assessed against an operator, consideration of a foreman's action is proper. Even where non-supervisory employees are involved, the operator is not necessarily shielded from imputations of negligence. A H Smith Stone Co., 5 FMSHRC 13 (1983). In such a case it is necessary to look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervision, training and discipline of its employees to prevent violation of the standard in issue.

In this case the section foreman knew that the decedents were on his section. Indeed, he saw them when they arrived. He was on the telephone and they said hello to him. He did not however, stop them to ask where they were going and what they were doing. I accept the testimony of the MSHA inspector that the section foreman is responsible for the safety of everyone on his section (Tr. 15, 24-25, 38). The section foreman himself specifically admitted this (Tr. 58). This being so, the section foreman was negligent in not stopping the decedents to find out their destination and what they were going to do. People cannot come and go as they please in an underground mine. It is simply too dangerous. It was especially dangerous here where the foreman, continuous miner operator and mine helper all knew the roof in the area was bad. The section foreman has the authority and responsibility to control what is happening on his section. He must exercise that authority and meet that responsibility. If he does not, he is negligent, as he was in this case. Under such circumstances the section foreman's negligence is attributable to the operator. The violation was very serious since it bore a direct causal relationship to the two fatalities.

A penalty of \$7,500 is assessed.

Citation 2104532

Citation No. 2104532, dated 5/24/83, sets forth the alleged violative condition or practice as follows:

During the course of a fatal roof fall accident investigation it was revealed that there was a violation of drawing No. 1 of the operator's approved roof control plan dated 2/10/83. The violation occurred during mining of the face of No. 6 room from No. 20 split, 7 to 6 room in 7 flat right 8 room right (006) section. After completion of mining sequence No. 3 a second temporary roof support was not installed on the canvas side (left side) as required by the approved roof control plan.

Drawing No. 1 of the operator's roof control plan entitled "Temporary Support During Mining" sets forth the mining sequence and the installation of temporary roof supports. The record is uncontradicted that the second temporary roof support was not installed when it should have been in the mining sequence (Tr. 68, 111-112). This constituted a violation of Drawing No. 1 of

the plan and therefore a violation of the mandatory standard. The operator's argument that Drawing No. 1 should not be applied to this case must be rejected. I recognize that the intersection was open so that there were not two solid walls of coal on the sides of the No. 6 room. However, I find persuasive the MSHA inspector's testimony that the row of permanent supports ("c" on Operator's Exhibit No. 3) is analogous to or takes the place of a rib such as is indicated on Drawing No. 1 (Tr. 102-103). Moreover, I am not willing to adopt an interpretation of the roof control plan that would leave no guidelines or requirements for the routine driving of an intersection such as occurred here. Finally, the fact that the first roof support was installed in accordance with Drawing No. 1 shows that the miners themselves believed that Drawing No. 1 was applicable. Drawing No. 23, referred to by the operator is irrelevant because it is based upon methods of ventilation advancement and gas testing which everyone agreed were not present here (Tr. 79, 122).

The roof control plan is the operator's plan. If the operator believes it does not specifically cover a particular situation, especially a common one like this case, it can amend its plan and seek approval from MSHA. Here, the conclusion is unescapable that both the operator and MSHA believed Drawing No. 1 applied but that after the fatality occurred, the operator attempted to argue that nothing applied. This position is not persuasive. Moreover, ad hoc revisions of a plan by an Administrative Law Judge on a case-by-case basis should be avoided. In light of the foregoing, I conclude that a violation existed.

I accept the evidence which shows that the missing jack was designed for roof support. The absence of such a jack in an area of poor roof was serious and, meets the criteria adopted by the Commission for the finding of a significant and substantial violation. U. S. Steel Mining Co., Inc., 8 FMSHRC 1834 (1984); U. S. Steel Mining Co., Inc., 8 FMSHRC 1866 (1984). The Secretary's proof however, falls short of showing a causal link between the absent bolt and the fall that occurred since the inspector would only say, with visible reluctance, that it was "possible" that the additional bolt would have prevented the actual fall (Tr. 110-111). The inspector believed such a link was speculative (Tr. 110). The bolt would have been at the edge of the fall area which is where the fall should have been expected to break off even if a bolt had been installed (Tr. 111-112).

The inspector testified that the operator was negligent in not having the approved roof control plan followed (Tr. 70-71). As set forth above, the Commission has held that the fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In such a case, the Commission has said that consideration must be given to the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. A. H. Smith Stone Company, supra. The Solicitor did not address himself to any of these issues and the record is silent as to them. Old Dominion Power Company, 8 FMSHRC 1866, 1895-6 (1984). The Solicitor has failed to meet his burden on these factors. Accordingly, I find the operator not negligent.

A penalty of \$350 is assessed.

ORDER

Citations 2104531 and 2104532 are both AFFIRMED.

In light of the foregoing, the operator is hereby ORDERED to pay \$7,850 within 30 days from the date of this decision.



Paul Merlin  
Chief Administrative Law Judge

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/g1

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

**NOV 30 1984**

RUSHTON MINING COMPANY : CONTEST PROCEEDING  
Contestant :  
 :  
v. : Docket No: PENN 85-44-R  
 : Order No: 2255375; 11/1/84  
 :  
 : Rushton Mine  
 :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent :

DECISION

Appearances: Joseph T. Kosek, Esq., Rushton Mining  
Company, Ebensburg, Pennsylvania for  
Contestant  
Robert A. Cohen, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Arlington, Virginia, for Respondent

Before: Judge Moore

This case was heard on an expedited basis because of Rushton's allegation that the way MSHA was requiring it to comply with its self-contained self-rescue device storage plan created a serious hazard to the miners. The case involves differences of opinion and interpretation rather than disputed facts.

Contestant's self-contained self-rescue device storage plan (Respondent's exhibit 4, consisting of eight letters) requires, among other things, that:

"the storage area for sections shall be in the designated intake escapeway or in intake air adjacent to and connected to the designated intake escapeway".

(See letter of July 6, 1982). Respondent interprets that provision as allowing it to designate as the storage area the inby end of the track in the trolley haulage entry which

is on intake air and which is a designated escapeway. MSHA interprets the provision as requiring storage in the No. 5 entry which it argues is the main intake air entry and designated escapeway or in the No. 4 entry which is also intake air and adjacent to a designated escapeway.

Operator's exhibits 2 and 3 and Respondent's exhibit 5 are all maps of the section in question and the face area is at the tops of the maps. The No. 1 entry to the left is return air. The No. 2 entry is the trolley haulage entry for men and supplies and is also on intake air and is a designated escapeway. No. 3 entry is the belt haulage entry which is also on intake air. No. 4 and 5 entries are intake air, No. 5 being the other designated escapeway.

The mine consists of five sections and the company's method of complying with its plan is to designate the trolley haulage (or track entry) as an escapeway, arrange to have it on intake air and store the self-contained self-rescue devices in the portabus at the inby end of the track. The five sections are not identical as to which entry is the track entry, and which is the belt entry, etc. They are the same to the extent that no matter what section a miner is working in he knows that the self-contained self-rescue devices are located at the inby end of the track entry, the entry by which he reached the face at the beginning of his shift. Under MSHA's interpretation of the plan Rushton can continue to use the portabus at the inby end of the track as a storage area in three of the sections but in two of the sections including the S-3 2nd south mains, Section No. 3, the section at which the citation was issued, the storage area would have to be in a different place. The operator contends that this would cause confusion among the miners in an emergency and that removing the self-rescue self-contained device from the portabus and transporting them to the newly designated storage areas increase the chance of damaging and rendering useless these self-contained self-rescue devices. There is a red button on the device, which if hit will open it and start the gas flowing. At the end of an hour it would be useless.

The self-contained self-rescue devices involved herein, unlike the ordinary self-rescue device, is not small. It is bigger than a football and weighs about eight pounds. The coal seam is 39" high and in order to comply with the citation the miner would have to take his device off of the portabus and either have it transported by a tractor or carry or drag it several hundred feet. The only factual dispute that arose during the trial, was that the superintendent said that the inspector required that the storage location be in the second break outby the face, whereas the inspector himself said that it could be anywhere in entry No. 4 within

a thousand feet from the face. In any event, transportation of the self-rescuing devices would be required twice on every shift. 1/.

Mine Superintendent Roeder, who has a B.S. in mining, testified that damage to the self-contained self-rescue device was more likely if it had to be removed from the portabus and transported for a certain distance in 39" coal. He testified that he would expect the men in an emergency to come out the track entry since they knew it so well and the track escapeway was clearly marked. Also, there is a telephone in that entry. Mine safety inspector Crane said the inspector made him put the storage area in the No. 4 entry near the face and that miners sometimes at quitting time forgot to go into that entry to pick them up but headed straight for the portabus.

Mr. Hollen was a roof bolter operator. He was chairman of the United Mine Workers of America mine safety and health committee and had been so for four years. He had 21 years experience in mines and approved the operator's original storage area in the portabus for the self-contained self-rescue devices. The new location required for termination of the Order No. 2255375 caused confusion, he said. In handling the device, if you bumped the red spot, the device would come open and would be no good thereafter. He also said that in the face area there was no safe place to store them where a scoop or tractor might not run over them. He also said that as an escapeway, he would prefer the track entry. Another member of the United Mine Workers of America was Mr. Davidson, a belt examiner. He had 14 years experience in mining and was vice-president of the local union and chairman of the mine committee. He did not agree with the MSHA order and thought that the less you moved the self-contained self-rescue device the better. Mr. Baker, another union member, was a motorman with 12 years experience in the mines. He preferred the former storage area in the portabus. He said that miners were concerned and confused by the storage area required by MSHA. They want to do down to the dinner hole, which is in the track entry, and escapeway but are afraid that in an emergency they will forget to go to No. 4 entry to pick up their self-contained self-rescue devices. Mr. Jury, a roof-bolter helper, has 12 years experience in the mines. He is a member of the mine safety and health committee, and he does not agree with MSHA's directions in this case.

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1/ The self-contained self-rescue device costs about \$500 and if the operator had been willing to supply two self-contained self-rescue devices for every miner, one device could remain on the portabus, and one could remain in the storage area so as to avoid transportation twice on each shift. MSHA has not suggested that the operator should be required to buy two such devices for each miner.

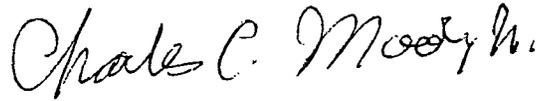
He said the action taken to terminate the order caused too much handling of the devices and confusion as to their location. He saw no benefit in keeping the devices closer to the face. Near the close of the hearing, the inspector was recalled to the stand and disagreed with the concerns expressed by the various miners and other witnesses for the company.

Section 75.1704 of Title 30 of the Code of Federal Regulations requires that a mine contain at least two separate escapeways one of which must be on intake air. Section 75.1707 of Title 30 CFR requires that in any working section opened after March 30, 1970, the escapeway that is required to be on intake air shall be separated from the belt and trolley haulage entries. As I interpret these sections, if one of the two required escapeways was on return air, then the escapeway on intake air could not be either a haulage track or belt haulage entry. From this, MSHA apparently, and it was not too clear at the trial, concludes that the escapeway which is not on a track entry or a belt entry, but is on intake air, is the "main" escapeway. There is no doubt that the MSHA office intended that the term "designated intake escapeway" in the July 6, 1982 letter mean an intake escapeway other than a track entry or a belt entry. But nevertheless item No. 2 in the July 6, 1982 letter, states, and I will repeat "the storage area for sections shall be in the designated intake escapeway or in intake adjacent to and connected to the designated intake escapeway". In this case both designated escapeways were on intake air, and I hold that the storage area could have been in either designated intake escapeway or in intake air adjacent to and connected to a designated intake escapeway.

As to the safety of the storage area required by MSHA, it is also a matter of opinion. Four experienced miners and two experienced supervisors testified as to the preference, from a safety standpoint, for having the devices in the portabus at the end of the track in the track entry. All stated that they thought that any handling of the devices increased the chance of their being rendered inoperative. Inspector Klemick thought their fears were unfounded and he is also an experienced inspector. The miners carried normal (not self-contained) self-rescue devices at all times and these would protect them for up to one hour and would certainly last for the ten to fifteen minutes it would take to get to the portabus where the self-contained self-rescue devices were stored. There is no way of knowing who has the correct opinion, but when six experienced miners testified that a certain way of doing something is hazardous and another way of doing

it is safe, I have to go along with them and hold that the storing of self-contained self-rescue devices in the portabus in the track entry is safer than storing them in a different entry in two of the five sections.

The ORDER is VACATED and the case is DISMISSED. 2/.



Charles C. Moore, Jr.  
Administrative Law Judge

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2/ I reject the company's argument that an order can not be modified after termination. I respectfully disagree with Judge Sweeney's opinion to the contrary.

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